RECORD, CASE No. 15,352.

155-57

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 988. 550

CHARLES EDWARD LEWIS, APPELLANT,

vs.

PIMA COUNTY, ARIZONA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 18, 1893.

RECORD, CASE No. 15,352.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 968.

CHARLES EDWARD LEWIS, APPELLANT,

vs.

PIMA COUNTY, ARIZONA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a At a term of the supreme court in and for the Territory of Arizona, begun and holden at the city of Phœnix, the capitol of said Territory and the place fixed by law for the session of said court, the 2nd Monday in January, A. D. 1893, there were present the chief justice, Gooding, and Associate Justices Kibbey and Wells and T. D. Hammond, clerk; and in said court certain proceedings were had and entered of record as follows, viz:

b No. 355.

In the Supreme Court, Territory of Arizona.

CHARLES EDWARD LEWIS, Appellant,
vs.
PIMA COUNTY, Appellee.

Transcript on Appeal.

Filed September 26, 1892.

T. D. HAMMOND, *Clerk.*

1 In the Supreme Court of the Territory of Arizona.

CHARLES EDWARD LEWIS, Appellant,
vs.
PIMA COUNTY, Appellee.

Transcript on Appeal.

Be it remembered that the district court within and for the county of Pima, and first judicial district of Arizona Territory, met this 9th day of March, 1891, at the court-house in the city of Tucson, county of Pima and Territory of Arizona, pursuant to law, at
2 10 o'clock a. m., Hon. Richard E. Sloan, associate justice, presiding.

And on the 25th day of June, A. D. 1891, the plaintiff filed a certain complaint, which said complaint is now on file in said court, and by order of the court the following was substituted therefor, as appears by the following order of the judge of said court:

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant.

It is hereby stipulated by the parties to said cause, that with the approval of the judge, that the clerk of said court be directed in making up the transcript in this cause for the appellate court, to omit therefrom the numerous and voluminous causes of action in the complaint set forth, filed in said court June 25, 1891, and in

lieu thereof agree upon a brief statement of the said complaint hereto attached as sufficiently setting forth the same, and the
3 same shall be substituted in place of the original complaint herein, and shall be copied into the transcript and the original complaint omitted.

Dated Tucson, June 2, 1892.

BARNES & MARTIN AND
ROSSINGTON, SMITH & DALLAS,
Attorneys for Plaintiff.

WM. M. LOVELL, *District Attorney.*
C. W. WRIGHT AND SELIM M. FRANKLIN,
Attorneys for Defendant.

The above stipulation and agreement in writing is hereby approved by Richard E. Sloan, judge of said court, and the original complaint may be omitted from the transcript, and this agreement and a brief statement of the complaint substituted therefor.

And the brief statement of the complaint hereto attached shall constitute a part of the record in said cause, and the same is hereby signed and approved.

Dated, Tucson, Ariz., June 9, 1892.

RICHARD E. SLOAN,
Judge of the District Court in and for Pima County, Arizona.

4 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant.

And now comes the plaintiff by Barnes & Martin, and Rossington, Smith & Dallas, his attorneys, and alleges:

I.

That the plaintiff resides in the city of London, England, and that defendant resides in the said county of Pima, Arizona Territory.

And for his second cause of action the said plaintiff says:

That on the first day of July, A. D. 1883, in the city of Tucson, in the county of Pima in the Territory of Arizona, the said defendant made and issued its certain bond, dated on said date, whereby, for value received, the said defendant, The County of Pima, promised to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, 1903, the sum of one thousand dollars, lawful money of the United States, with interest thereon at
5 the rate of seven per *with interest thereon at the rate of seven per* cent. per annum, said interest payable at the office of the treasurer of said Pima county semi-annually on the first days of

January and July of each year, on presentation and surrender of certain interest coupon- thereunto attached.

That it was recited upon the face of said bond as follows:

"This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona, entitled, 'An act to promote the construction of a certain railroad,' passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof, the 21st day of February, A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest and running like time as the bonds of which this is one."

Which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereunto attached, marked "Exhibit A," and made a part hereof.

That attached thereto was, among others, a certain interest coupon, made by the said Pima county, whereby it promised to pay to bearer, "on the first day of January, 1884, at the county treasurer's office at Tucson, thirty-five dollars, being interest due on bond No. 1," which coupon is in words and figures as follows, to wit:

6

Pima County Bond.

Coupon No. 1.

On the first day of January, A. D. 1884, the county of Pima, in the Territory of Arizona, will pay to the bearer, at the county treasurer's office at Tucson, thirty-five dollars ($35). Being interest due on bond No. 1.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
CHARLES R. DRAKE,
Recorder of Pima County.
WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.

That before said coupon, by its terms, became due and payable, said bond, together with said coupon, came to and for value became the property of said plaintiff, who thereupon became, and ever since has been, and still is, the true and lawful owner and holder thereof.

That when said coupon by its terms became due and payable, the same was duly presented at the place of payment therein mentioned, and payment demanded, but refused because said defendant had not, nor did it ever have, funds at said place with which to pay the same. That said plaintiff has often applied to said defendant to pay said coupon, but it has refused to do so notwithstanding it is justly indebted thereon to said plaintiff in the sum of thirty-five dollars, which he claims, with interest, from the first day of January, 1884.

7

And for his third cause of action, said plaintiff says:

That on the first day of July, A. D. 1883, in the city of Tucson, in the county of Pima, in the Territory of Arizona, the said defendant made and issued its certain bond, dated on said date, whereby, for value received, the said defendant, The County of Pima, promised to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, 1903, the sum of one thousand dollars, lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of said Pima county semi-annually on the first days of January and July of each year, on presentation and surrender of certain interest coupons thereunto attached.

That it was recited upon the face of said bond as follows:

8 "This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled, 'An act to promote the construction of a certain railroad,' passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof, the 21st day of February, A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company, of like amounts, bearing like interest, and running like time as the bonds of which this is one."

Which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereunto attached, marked "Exhibit A," and made a part hereof.

That attached thereto was, among others, a certain interest coupon, made by the said Pima county, whereby it promised to pay to bearer, "on the first day of July, 1884, at the county treasurer's office at Tucson, thirty-five dollars, being interest due on bond No. 1," which coupon is in words and figures as follows, to wit:

Pima County Bond.

Coupon No. 2.

9 On the first day of July, A. D. 1884, the county of Pima, in the Territory of Arizona, will pay to the bearer, at the county treasurer's office at Tucson, thirty-five dollars ($35). Being interest due on bond No. 1.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
CHAS. R. DRAKE,
Recorder of Pima County.

WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.

That before said coupon, by its terms, became due and payable said bond, together with said coupon, came to and for value become the property of said plaintiff, who thereupon became and ever

since has been, and still is, the true and lawful owner and holder thereof.

That when said coupon, by its terms, became due and payable, the same was duly presented at the place of payment therein mentioned, and payment demanded, but refused because said defendant had not, nor did it ever have, funds at said place with which to pay the same. That said plaintiff has often applied to said defendant to pay said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to said plaintiff in the sum of thirty-five dollars, which he claims, with interest from the first day of July, 1884.

And for his fourth cause of action, said plaintiff says:

10 That on the first day of July, 1883, in the city of Tucson, in the county of Pima, in the Territory of Arizona, the said defendant made and issued its certain bond, dated on said date, whereby, for value received, the said defendant, The County of Pima, promised to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, 1903, the sum of one thousand dollars, lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of said Pima county semi-annually on the first days of January and July of each year, on presentation and surrender of certain interest coupon- thereunto attached.

That it was recited upon the face of said bond as follows:

"This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled, 'An act to promote the construction of a certain railroad,' passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof, the 21st day of February, A. D. 1883, and this bond is one of a series of two hundred issued in pur-

11 suance of said act and exchanged for a like number of bonds of said railroad company, of like amounts, bearing like interest, and running like time as the bonds of which this is one."

Which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereunto attached, marked "Exhibit A," and made a part hereof.

That attached thereto was, among others, a certain interest coupon, made by the said Pima county, whereby it promised to pay to bearer, "on the first day of July, 1885, at the county treasurer's office at Tucson, thirty-five dollars, being interest due on bond No. 1," which coupon is in words and figures as follows, to wit:

Pima County Bond.

Coupon No. 3.

On the first day of January, A. D. 1885, the county of Pima, in the Territory of Arizona, will pay to the bearer, at the county

treasurer's office at Tucson, thirty-five dollars ($35). Being interest due on bond No. 1.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
CHARLES R. DRAKE,
Recorder of Pima County.

WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.

12 That before said coupon, by its terms, became due and payable, said bond, together with said coupon, came to and for value became the property of said plaintiff, who thereupon became, and ever since has been, and still is, the true and lawful owner and holder thereof.

That when said coupon by its terms became due and payable, the same was duly presented at the place of payment therein mentioned, and payment demanded, but refused because said defendant had not, nor did it ever have, funds at said place with which to pay the same. That said plaintiff has often applied to said defendant to pay said coupon, but it has refused to do so notwithstanding it is justly indebted thereon to said plaintiff in the sum of thirty-five dollars, which he claims, with interest, from the first day of January, 1885.

And for his fifth cause of action, said plaintiff says:

That on the first day of July, A. D. 1883, in the city of Tucson, in the county of Pima, in the Territory of Arizona, the said defendant made and issued its certain bond, dated on said date, whereby, for value received, the said defendant, The County of Pima, promised to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the treasurer of said county, in the city of

13 Tucson, on the first day of July, 1903, the sum of one thousand dollars, lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of said Pima county semi-annually on the first days of January and July of each year, on presentation and surrender of certain interest coupons thereunto attached.

That it was recited upon the face of said bond as follows:

"This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled, 'An act to promote the construction of a certain railroad,' passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof, the 21st day of February, A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company, of like amounts, bearing like interest, and running like time as the bonds of which this is one."

Which bond, in order to distinguish it from others of like character, was marked No. 1. A copy of said bond, except as to number, is hereunto attached, marked "Exhibit A," and made a part hereof.

14 That attached thereto was, among others, a certain interest coupon, made by the said Pima county, whereby it promised to pay to bearer, "on the first day of July, 1885, at the county treasurer's office at Tucson, thirty-five dollars, being interest due on bond No. 1," which coupon is in words and figures as follows, to wit:

Pima County Bond.

Coupon No. 4.

On the first day of January, A. D. 1885, the county of Pima, in the Territory of Arizona, will pay to the bearer, at the county treasurer's office at Tucson, thirty-five dollars ($35). Being interest due on bond No. 1.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
CHARLES R. DRAKE,
Recorder of Pima County.

WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.

That before said coupon, by its terms, became due and payable, said bond, together with said coupon, came to and for value become the property of said plaintiff, who thereupon became and ever since has been, and still is, the true and lawful owner and holder thereof.

That when said coupon, by its terms, became due and payable, the same was duly presented at the place of payment therein
15 mentioned, and payment demanded, but refused because said defendant had not, nor did it ever have, funds at said place with which to pay the same. That said plaintiff has often applied to said defendant to pay said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to said plaintiff in the sum of thirty-five dollars, which he claims, with interest, from the first day of July, 1885.

Here follows 2,246 causes of action identical with the foregoing causes of action numbered 2, 3, 4 and 5; and numbered consecutively up to and including No. 2251.

Each cause of action (except the first) declares upon an interest coupon, upon each of 150 bonds, numbered consecutively from 1 to 150 inclusive, of date July 1st, 1883, a copy of one of which bonds is attached to said complaint and described in each cause of action (except the 1st cause of action), and 15 coupons are declared upon attached to each bond, one due 1st day of January and one due 1st day of July, successively from the 1st day of January, 1884, to and including the 1st day of January, 1891, making a total of 2,250 coupons declared upon attached to the 150 bonds aforesaid, the last cause of action, being cause of action No. 2351.

The conclusion of said complaint is as follows, viz:

16 Wherefore by reason of the premises the said defendant became and was at the time of the commencement of the said action indebted to plaintiff in the said several sums of money in the

said several causes of action alleged, viz: In the sum of one hundred thousand dollars ($100,000.00), and being so indebted, the said defendant promised and undertook to pay the same on demand, and though often demanded, the said defendant has refused and still refuses to pay the same, to the plaintiff's damage of $100,000.00.

Wherefore he prays this suit.

WM. H. BARNES,
JOHN H. MARTIN,
Attorneys for Plaintiff.

ROSSINGTON, SMITH & DALLAS, *Of Counsel.*

That there is attached to said complaint a copy of one of said bonds marked " Exhibit A," in the words and figures following:

" EXHIBIT A."

UNITED STATES OF AMERICA:

One thousand dollars.	TERRITORY OF ARIZONA, *County of Pima.*	One thousand dollars.

The county of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Rail-
17 road Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled "An act to promote the construction of a certain railroad," passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors and counter-
18 signed by the clerk of said board, and by the county recorder of the said county of Pima, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed hereto the seal of said county recorder's office this first day of July, A. D. 1883.

JAMES H. TOOLE,
Chairman Board Supervisors.
CHAS. R. DRAKE,
County Recorder. [SEAL.]

WILLIAM J. OSBORNE,
Clerk Board of Supervisors. [SEAL.]

Bond No. 82. *Pima County Bond.*

Coupon No. 40.

On the first day of July, A. D. 1903, the county of Pima, in the Territory of Arizona, will pay to the bearer, at the county treasurer's office at Tucson, thirty-five dollars ($35). Being interest due on bond No. 82.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
CHARLES R. DRAKE,
Recorder of Pima County.

WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.

And here follows attached to said bond 39 coupons numbered consecutively from 1 to 39, of like tenor and effect as coupon
19 above except as to date of payment and number of coupon.

(Endorsed:) No. 1976. Brief statement of complaint agreed to by both parties. Filed June 11, 1892, Brewster Cameron, clerk, by Charles Bowman, deputy clerk.

And on the 10th day of October, A. D. 1891, the defendant filed its demurrer and answer thereto in words and figures following, to wit:

In the District Court, First Judicial District, Territory of Arizona, County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant.

I.

Defendant demurs to the complaint herein, and to each and every one of the counts thereof, and for cause shows:

1. That said complaint, nor either of the counts thereof, does not state facts sufficient to constitute a cause of action.

2. That it does not appear in and by said complaint, nor either of the counts thereof, that the demands sued for herein, nor any, nor either of them, were presented to the board of supervisors
20 of said county within six months next after their maturity, nor at all; nor that said board ever passed upon the same in any way; nor that their payment was ever refused by said board.

3. That each and all of the coupons sued on herein that matured four years next before the institution of this suit, is barred by the statute of limitations, and no suit thereon can now be maintained.

4. That said complaint fails to show that any part or portion of the line of railroad of the Arizona Narrow Guage railroad, was ever constructed or operated, or intended to be constructed or operated,

or that the same is, was, or ever was intended to be of any public utility, or in any sense to serve the public use.

5. That nothing is stated nor shown in said complaint that the conditions precedent in said pretended legislative enactment, contained upon the happening of which the said treasurer of said county was attempted to be commanded to deliver said bonds, in said complaint described, were in any way, nor to any extent, complied with; nor that said treasurer ever delivered said bonds and coupons to any one.

6. That said pretended act of the legislature is a mandatory command upon said county, and as such it is not a rightful sub-
21 ject of legislation, is *ultra vires* and void.

7. That said pretended act of the legislature confers upon the narrow gauge railroad company, a corporation, and especial privilege that was at that time, and from thence hitherto has ever been, expressly forbidden by the organic act of this Territory.

8. That said complaint contains divers causes of action, each and all of which are set forth in one and the same count.

9. That said complaint fails to separate and number the different causes of action in it contained, and therefore it is impossible to tell and to identify the different causes of action in said complaint contained, and the same is therefore vague, uncertain and unintelligible.

II.

And defendant, for a further and a second answer to said complaint, denies each and every the allegations therein contained, as well also, each and every the allegations, and each and all thereof, in each count in said complaint contained.

III.

And defendant for a further and a third answer to said complaint alleges that the coupons, in said complaint described, and each and all thereof, were not, nor were either nor any of them, at any time, within six months next after their maturity, nor at any
22 time, ever presented to the board of supervisors of said county, as a claim against said county, nor for any purpose, nor at all; nor were said coupons, nor any nor either thereof, at any time ever rejected by said board of supervisors, nor were the same nor any thereof, so presented to said board as a claim against said county and rejected by it, at any time within six months next previous to the commencement of this action.

IV.

And defendant for a further and a fourth answer to said complaint alleges, that no action hath accrued to said plaintiff by reason of the matters in said complaint alleged in so far as the same is founded upon any of said coupons that matured and become payable at any time within four years next previous to the commencement of this action; and that as to all such coupons the same, and each thereof, are barred by the statutes of limitations in

such case made and provided; and as to such coupons and each thereof, the defendant hereby pleads said statute of limitations thereto and in bar thereof.

V.

And defendant for a further and a fifth answer to said complaint alleges that the coupons specified and described in said complaint were, and each of them was, attached to and were a part
23 of certain bonds; that said bonds and coupons purported to be the bonds and coupons of defendant; that said bonds and coupons and each — all thereof, upon their execution by the defendant were intrusted by it to the keep- of the treasurer of defendant, to be by him safely and securely kept in the iron safe of the defendant that was then and now in the custody and care of said treasurer; and defendant further avers, that at the time defendant so entrusted said treasurer with the custody and keep of said bonds and coupons as aforesaid, it instructed said treasurer not to deliver said bonds and coupons, nor none of them to the said Arizona Narrow Gauge Railroad Company, nor to its order, nor to any other person, or persons, corporation, or corporations, whatsoever or whomsoever, nor upon any account whatsoever; that said treasurer, by reason of the premises aforesaid, received said bonds and coupons, and pursuant to said instruction to safely keep the same in said iron safe and not to deliver the same to any person whomsoever as aforesaid, placed the same and each and all thereof, in said iron safe, and did then and there promise defendant to safely keep the same, and all thereof, and not to deliver the same or any thereof, to any person, or persons, on any account whatsoever. That
24 afterwards it was discovered by said defendant that said bonds and coupons, so placed in said iron safe and placed in the care and custody of said treasurer as aforesaid, had been unknown to said defendant, and without its consent, and against its express consent, carried away; that defendant did not then know and does not now know who it was that possessed themselves of said bonds and coupons or of any thereof, by reason of their having been taken from the possession of the said treasurer as aforesaid. That said treasurer did not deliver said bonds and coupons, nor any nor either thereof to the said railroad company, nor to any other person or persons whomsoever, nor on any account whatsoever; that said bonds were abstracted from said safe, and from the said custody and keep of said treasurer, without the knowledge and without the consent of said defendant and of said treasurer; but on the contrary thereof, the possession of said bonds and coupons *were* taken from said iron safe, and from said treasurer, against the will and wish of defendant and of said treasurer; That defendant never knew who the persons were who claimed to be lawfully possessed and the owners of said bonds and coupons, or of any thereof if such there were, until it was informed, on the bringing of this action,
25 that the plaintiff herein claimed to be the owner and in the lawful possession of such bonds and coupons.

Wherefore and by reason of the premises aforesaid, defendant

alleges that said bonds and all thereof, and said coupons and all thereof, were never delivered by defendant and are not the bonds and coupons of the defendant; and defendant therefore demands judgment, that the plaintiff herein be required by the order of this court to produce and surrender said bonds and coupons, and each and all thereof, and deliver the same to the defendant for cancellation.

VI.

And for a further and a sixth answer to said complaint, defendant alleges that said act of the Legislative Assembly of the Territory of Arizona, commanding the defendant to deliver the bonds of the defendant to the said Arizona Narrow Guage Railroad Company in exchange for the bonds of said company for an equal amount, was enacted upon the belief that said company would operate a line of railway within the Territory of Arizona, and that thereby the aid extended to the said company would be aid extended to a public way, and would be of benefit to the residents of said county. That unless said railway was built and operated it would not and could not be a public way, nor could the said aid in such case be
26 extended to anything that could in any way nor to any extent be of any public use; that if said railway should not be operated then the aid so commanded to be extended to it as aforesaid, would be aid extended to a private use only, and as such the said legislative enactment would be wholly void.

That by reason thereof, defendant alleges, that the said act of the Legislative Assembly of the Territory of Arizona contained by necessary implication the proviso that said railway should be a public way, and to that end should be operated; and that such proviso and condition was and is a necessary condition precedent to the validity of said enactment, and to the validity of the bonds and coupons made and issued pursuant thereto, the same being the bonds and coupons specified and described in said complaint.

And defendant avers, that said railway was never operated.

VII.

And for a further and seventh answer to said complaint defendant alleges that at the time of the passage of said act of the Legislative Assembly whereby the defendant was commanded to make its said bonds and deliver them to the said Arizona Narrow Guage Railroad Company, the said company consisted only of an
27 organization under and by virtue of the statute authorizing the incorporation of companies. That none of the shares of stock of said company had been taken and paid for. That said company was possessed of no property of any kind. That its existence was merely a paper existence and consisted only of a certificate of incorporation made and executed pursuant to said statute. That by reason thereof the said bonds to be made by said company as aforesaid, and to be issued and delivered to said defendant in lieu of said defendant's bonds and in exchange therefor as commanded in and by said act, were of no value to any one for any

purpose whatsoever. That said legislative enactment did not vest in said defendant any discretion whatever whether it should make its own bonds and exchange them for the worthless bonds of said company or not. That by reason of the premises aforesaid, the receipt of said bonds of said company was but an idle form, and the said bonds of defendant were in truth and in fact a donation from defendant to said company exacted by said legislative enactment, and, therefore, said enactment and said bonds and the said coupons thereunto attached and sued on herein were and are wholly void, and were not and are not the bonds of said defendant.

28 VIII.

And for a further and eighth answer to said complaint defendant alleges that the said legislative enactment pursuant to which said bonds and the coupons thereunto annexed and sued on herein were made commanded defendant to make and deliver the same whether it wished to or not, and did not vest in nor leave to said defendant any discretion whatsoever whether it should make and deliver the same or not; and that said bonds and coupons, and each and all thereof, were made and delivered by said defendant in obedience to said legislative command, and for no other reason or cause whatsoever. That by reason thereof no contract existed between said defendant and said Arizona Narrow Guage Railroad Company to make and deliver said bonds, or any thereof unto said company, nor to its order. That many of said bonds and coupons, to wit: bonds numbered from 101 to 150, inclusive, together with each and all of the coupons thereto annexed, were made and delivered to said company after the thirtieth day of July, 1886, at which time said legislative enactment was repealed and made void by act of the Congress of the United States, approved on said day, and known as "the Harrison act." Wherefore defendant avers that as to said num-

29 bered bonds, and the coupons thereunto annexed, and each and all thereof, no authority existed for their execution nor for their delivery, and they and all of them are wholly void and are not the bonds and coupons of defendant.

IX.

And defendant for a further and ninth answer to said complaint alleges that said legislative enactment pursuant to which the bonds and coupons herein sued on were made and delivered, was a legislative command on the defendant to make and deliver said bonds and coupons in exchange for the bonds of said railroad company; that no election nor discretion was in, and by said act, vested in defendant, whether it should make and deliver said bonds and coupons to said company or not. That said defendant, in obedience to said command, and for no other reason or purpose whatsoever, and against its judgment, wish and will, made and delivered said bonds and coupons to said company, then believing it was compelled so to do by reason of said mandatory act so to do.

And defendant avers that by reason of the premises aforesaid, said

legislative enactment was and is *ultra vires* was not and is not a rightful subject of legislation, and was and is void, and that because thereof said bonds and coupons, and each and all thereof are
30 not the bonds and coupons of defendant.

X.

And for a further and a tenth answer to said complaint defendant alleges that said legislative enactment pursuant to which the bonds and coupons herein sued on were made and delivered was a legislative command upon defendant to make and deliver said bonds and coupons unto the said Arizona Narrow Guage Railroad Company in exchange for the bonds of said company in an equal amount. That said company was at said time and from thence hitherto has been, and now is wholly insolvent, and its bonds were not at said time and from thence hitherto have not been and are not now of any value for any purpose whatsoever. That the effect of said exchange of said bonds was to invest the credit of defendant, that was then and is now good in said company, and thereby to grant to it a privilege that was especial to said company, and that was not granted nor extended to any other company or person whomsoever.

And defendant avers that by reason of the premises aforesaid said legislative enactment was an especial privilege granted to said company, and as such it was in conflict with the organic act of the Territory of Arizona, and was and is void. That by reason
31 thereof defendant avers that said bonds and coupons so made and delivered by defendant are not the bonds and coupons of the defendant.

Wherefore, defendant demands judgment that it shall go hence without day, and that it recover of and from the *defendant* its costs in this behalf most wrongfully expended.

WM. M. LOVELL,
District Attorney.

S. M. FRANKLIN AND
C. W. WRIGHT, *Of Counsel.*

(Endorsed:) No. 1976. Demurrer and answer. Filed October 10, 1891. Brewster Cameron, clerk. By S. Ainsa, deputy clerk.

And on the 5th day of May, 1892, the plaintiff filed his amendment to complaint herein, in words and figures following, to wit:

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant. } Amended Complaint.

And now comes the plaintiff, and leave of the court having
32 first been given, and amends the complaint herein by inserting in each cause of action, before the words, "that it was

recited upon the face of said bonds as follows," the words, "and delivered the same then and there to said railroad company."

BARNES & MARTIN,
Attorneys for Plaintiff.

(Endorsed:) No. 1976. Amendment to complaint. Service of a copy of the within acknowledged this 4th day of May, 1892. ——, district attorney, Pima county. Filed May 5, 1892, at 9.30 a. m. Brewster Cameron, clerk.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant.

In this case the plaintiff asked leave to amend the complaint herein and the same was granted by the court, and the proposed amendment was thereupon filed.

And the court thereupon came to the consideration of the
33 demurrer to the complaint—the same was by stipulation of the parties hereto treated as filed to the complaint as amended—and the court being fully advised in the premises doth sustain the demurrer to the complaint as amended, and to each and every cause of action thereof, and the plaintiff then and there excepted to the ruling of the court. And thereupon the court rendered judgment against the plaintiff, and doth order and adjudge that the said plaintiff take nothing by his said suit, and that the defendant have judgment for *his* costs fixed at $—.

And the plaintiff then and there in open court gave notice of appeal to the supreme court of the Territory of Arizona.

RICHARD E. SLOAN, *Judge.*

(Endorsed:) No. 1976. Judgment. Filed May 7, 1892. Brewster Cameron, clerk.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant.

34 Whereas, in the above-entitled cause pending in the above-entitled court, and at a regular term of said court, to wit: on the — day of April A. D. 1892, the said Pima County, defendant, recovered a judgment against the said Charles Edward Lewis, plaintiff, for the sum of — dollars, costs, from which judgment the said Charles Edward Lowis has taken an appeal to our supreme court:

Now, therefore, we, Charles Edward Lewis, as principal, and

George H. Daily and Charles C. Wheeler, as sureties, acknowledge ourselves bound to pay Pima county the sum of two hundred and fifty dollars, conditioned that the said Charles Edward Lewis, plaintiff, shall prosecute his appeal with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court.

Witness our hands this 20th day of May, A. D. 1892.

CHARLES EDWARD LEWIS,
By BARNES & MARTIN,
His Attorneys.
GEO. H. DAILY.
CHAS. C. WHEELER.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Geo. H. Daily and Charles C. Wheeler being severally duly
35 sworn, each for himself, deposes and says that he is at least worth the amount for which he became surety on the foregoing bond over and above his just debts and liabilities, and exclusive of property exempt from execution. That he is a householder or freeholder within the Territory of Arizona.

GEO. H. DAILY.
CHAS. C. WREELER.

Subscribed and sworn to before me this 20th day of May, A. D. 1892.

[SEAL.] JOHN H. MARTIN,
Notary Public, Pima County, Arizona.

I have fixed the probable amount of the costs of the suit of both the appellant court and the court below at two hundred and fifty dollars, and approve the foregoing bond this 20th day of May, A. D. 1892.

BREWSTER CAMERON,
Clerk of the District Court,
Per CHARLES BOWMAN, *D. C.*

(Endorsed:) No. 1976. Cost bond on appeal. Filed May 20, 1892. Brewster Cameron, clerk, by Chas. Bowman, deputy clerk.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

36 Be it remembered that the district court within and for the county of Pima, and first judicial district of the Territory of Arizona, met this fourteenth day of September, 1891, at the court-house in the city of Tucson, county of Pima and Territory of Arizona, pursuant to law, at 10 o'clock a. m., Hon. Richard E. Sloan, associate justice, presiding.

(Title of Court and Cause.)

Ordered that this cause be and it is hereby set for trial on Monday, November 9, 1891.

(Minute entry September 14, 1891. Book " H," page 367.)

(Title of Court and Cause.)

On motion of W. M. Lovell, Esq., district attorney for Pima county, and it appearing to the court that the board of supervisors have employed C. W. Wright, Esq., to assist the said district attorney in the defense of the suit herein, it is ordered that C. W. Wright be and he is hereby entered of record as associate counsel for said county of Pima in the above-entitled cause.

(Minute entry September 22, 1891. B. " H," page 387.)

(Title of Court and Cause.)

On motion of defendant it is ordered that the plaintiff do
37 give bond for costs in this case in the penal sum of five hundred dollars with sureties thereon to be approved by the clerk of this court, and that the plaintiff have ten days in which to file said bond.

(Minute entry October 19, 1891. B. " H," page 521.)

(Title of Court and Cause.)

On motion of W. H. Barnes, Esq., plaintiff's attorney, it is ordered (both parties consenting) that Tuesday, the 15th day of December, 1891, be and it is hereby set for the argument of the demurrer herein.

(Minute entry October 24, 1891. B. " H," p. 568.)

(Title of Court and Cause.)

On motion of C. W. Wright, Esq., attorney for defendant, it is ordered that this case be and it is hereby reset for trial on the first Monday, the 5th day of January, 1892.

(Minute entry December 19, 1891. Book " I," p. 2.)

(Title of Court and Cause.)

On motion of J. H. Martin, Esq., of counsel for plaintiff, it is ordered that plaintiff herein have ten days from this date to file a good and valid bond for costs in this action—defendant by its attorney, C. W. Wright, Esq., having moved the court to dismiss
38 this action on the ground that the cost bond filed herein is void.

(Minute entry December 19, 1891. B. " I," p. 3)

(Title of Court and Cause.)

Ordered that this case — and it is hereby set for trial on Tuesday, the 23rd day of February, 1892.

(Minute entry January 9, 1892. B. " I," p. 65.)

(Title of Court and Cause.)

It is ordered by the court that this case be and it is hereby set for Saturday, February 27th.

(Minute entry February 23, 1892. B. "I," p. 66.)

(Title of Court and Cause.)

On motion of Barnes & Martin, attorneys for the plaintiff herein, and upon the introduction of an affidavit of W. H. Rossington, for a continuance of this action, it is ordered that the same be and it is hereby continued until Monday, the 7th day of March, 1892.

(Minute entry February 27, 1892. B. "I," p. 75.)

(Title of Court and Cause.)

The defendant having filed its demurrer in writing to the plaintiff's complaint herein, and the same having regularly come on for hearing, Messrs. Barnes and Martin appearing for plaintiff,
39 and Messrs. Wright, Franklin and Lovell appearing for defendant, and the same being now fully argued by the respective counsel herein and submitted to the court, is by the court taken under advisement.

(Minute entry March 7, 1892. B. "I," p. 76.)

(Title of Court and Cause.)

The defendant having filed its demurrer in writing to the plaintiff's complaint herein, and the same having been argued and fully submitted to the court at a previous day of this term, and the same having been taken under advisement and the court being now fully advised in the premises—

It is hereby ordered, adjudged and decreed that said demurrer be and the same is hereby sustained, to which ruling of the court in sustaining said demurrer, plaintiff in open court instantly excepts and gives notice of an appeal therefrom to the supreme court.

Judgment herein to be entered hereafter.

(Minute entry May 2, 1892. B. "I," p. 288.)

(Title of Court and Cause.)

In this case the plaintiff asked leave to amend the complaint, and the same was granted by the court, and the proposed amendment was thereupon filed.

And the court thereupon *came* to the consideration of the
40 demurrer to the complaint, the same was by stipulation of the parties hereto treated as filed to the complaint as amended—and the court being fully advised in the premises doth sustain the demurrer to the complaint as amended, and to each and every cause of action thereof, and the plaintiff then and there excepted to the ruling of the court. And thereupon the court rendered judgment against the plaintiff, and doth order and adjudge

that the said plaintiff take nothing by his said suit and that the defendant have judgment for its costs taxed at —.

And the plaintiff then and there in open court give notice of appeal to the supreme court of the Territory of Arizona.

(Minute entry May 7, 1892. B. "I," page 298.)

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

CHARLES EDWARD LEWIS, Plaintiff,
vs.
THE COUNTY OF PIMA, Defendant.

And now comes the plaintiff and says that there is manifest error in the record and proceedings of said court in said cause, as follows, viz:

41 1st. The court erred in sustaining the demurrer to the complaint in this case.

2d. The court erred in rendering judgment for the defendant.

The plaintiff thereupon prays that the judgment in this case be reversed.

BARNES & MARTIN AND
W. H. ROSSINGTON,
Counsel for Plaintiff.

(Endorsed:) No. 1976. Assignment of errors. Filed May 7, 1892. Brewster Cameron, clerk, by Chas. Bowman, deputy clerk.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

I, Brewster Cameron, clerk of the aforesaid court, do hereby affirm the foregoing to be a true and correct transcript of the proceedings in the case entitled Charles Edward Lewis, plaintiff, *vs.* The County of Pima, defendant, No. 1976, as provided for in sections 224, 225 and 226, Revised Statutes of Arizona, as appears of record in the district court aforesaid.

And I further certify that the foregoing transcript was demanded by Messrs. Barnes & Martin, on the 5th day of September,
42 1892, and delivered to them by me on the 19th day of September, 1892.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, this 19th day of September, 1892.

BREWSTER CAMERON, *Clerk.*

43 In the Supreme Court of the Territory of Arizona.

Minute entry.

CHARLES EDWARD LEWIS, Appellant,
vs.
PIMA COUNTY, Appellee.

Motion to Dismiss Appeal.

Comes said appellee, by C. W. Wright, its attorney, and moves the court to dismiss the appeal in the above-entitled cause, and for grounds of motion shows—

That said appellant was ruled by this court to file his argument and brief in the above-entitled cause and in support of his said appeal within a specified time; that said time has long since lapsed and he has filed neither his said argument or brief therein.

Wherefore appellee says that said appellant has failed to prosecute his said appeal.

CHARLES WESTON WRIGHT,
Attorney for Appellee.

44 In the Supreme Court of the United States.

CHARLES EDWARD LEWIS, Plaintiff and Appellant,
vs.
PIMA COUNTY, Defendant and Respondent.

Assignment of Errors.

Now comes the plaintiff and alleges that there are manifest errors in the record and proceedings in said cause in the supreme court in and for the Territory of Arizona, in this, viz:

I.

The said court erred in affirming the judgment of the district court.

II.

The said court erred in affirming the judgment of the district court in sustaining the demurrer to the plaintiff's complaint and in rendering judgment on said demurrer against the plaintiff, but should have reversed the judgment of the district court upon said demurrer.

WILLIAM H. BARNES,
Attorney for Plaintiff.

W. H. ROSSINGTON,
JOHN H. MARTIN,
Of Counsel.

45 (Endorsed:) No. 355. In the supreme court of Arizona. Assignment of errors. Filed May 26, 1893. T. D. Hammond, clerk.

46 In the Supreme Court of the Territory of Arizona.

CHARLES EDWARD LEWIS, Appellant,
vs.
PIMA COUNTY, Appellee.
} Judgment.

Opinion by Kibbey, J.

This cause came on regularly to be heard, the parties hereto being duly represented, and, having by the court been duly considered, it is ordered that the judgment made and entered in the district court of the first judicial district, Territory of Arizona, in and for the county of Pima in favor of said County of Pima, appellee herein, and against said Charles Edward Lewis, appellant herein, be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that the said Pima County, appellee, do have and receive of and from said Charles Edward Lewis, appellant therein, and of his sureties on the appeal bond herein, its costs incurred in the lower court, taxed at $—, and its costs incurred and expended on this appeal in this court, taxed at $—.

Gooding, C. J., and Wells, J., concurring.

Tuesday, April 14, 1893.

47 In the Supreme Court of the Territory of Arizona.

CHARLES EDWARD LEWIS, Plaintiff and Appellant,
vs.
PIMA COUNTY, Defendant and Respondent.

Application for an Appeal.

The above-named plaintiff and appellant, conceiving himself aggrieved by the final judgment entered on the 14th day of April, 1893, in the above-entitled action and court against him and in favor of defendants and respondent, does hereby appeal therefrom to the Supreme Court of the United States; and he prays that his appeal may be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment, and evidence in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

WM. H. BARNES,
JOHN H. MARTIN,
Attorneys for Plaintiff and Appellant.

ROSSINGTON, SMITH & DALLAS,
Of Counsel.

48 And now, to wit, on the 3rd day of May, A. D. 1893, the above application having been presented and fully considered, it is ordered that the appeal be allowed as prayed for, and the same is hereby allowed upon the filing of a good and sufficient bond for costs in the sum of five hundred dollars.

HENRY C. GOODING,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 355. In the supreme court of Arizona. Application for appeal to Supreme Court United States. Filed May 3, 1893. T. D. Hammond, clerk.

49 In the Supreme Court, Territory of Arizona.

CHARLES EDWARD LEWIS, Plaintiff and Appellant,
vs.
PIMA COUNTY, Defendant and Appelle-.

Affidavit of Value.

TERRITORY OF ARIZONA,
County of Pima, } *ss:*

William H. Barnes and John H. Martin, being severally duly sworn, each for himself deposes and says—

That he is acquainted with the subject-matter in controversy in the above-entitled cause.

That the amount involved in said action exceeds the sum of one hundred and fifty thousand ($150,000.00) dollars.

WM. H. BARNES.
JOHN H. MARTIN.

50 Subscribed and sworn to before me this 27th day of April, 1893; and I certify that William H. Barnes and John H. Martin are personally known to me as credible persons.

JOS. C. PERRY,
Notary Public, Pima County, Arizona.

(Endorsed:) No. 355. Affidavit of amount involved in action. Filed April 29, 1893. T. D. Hammond, clerk.

51 In the Supreme Court of the Territory of Arizona.

CHARLES EDWARD LEWIS, Plaintiff and Appellant,
vs.
PIMA COUNT-, Defendant and Appellee.

Know all men by these presents that we, Charles Edward Lewis, as principal, and Wm. H. Barnes and John H. Martin, residents of Tucson, Arizona, as sureties, are held and firmly bound unto the county of Pima, in the Territory of Arizona, in the penal sum of five hundred dollars, lawful money of the United States, to be paid to the appellee, and for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this 27th day of April, A. D. 1893.

Whereas the above-named Charles Edward Lewis having taken an appeal to the Supreme Court of the United States, and the same having been allowed, from a final judgment rendered against him

in favor of Pima county in the supreme court of the Territory of Arizona to reverse the judgment rendered in said court:

Now, therefore, the condition of this obligation is such that if the above-named Charles Edward Lewis shall prosecute his appeal
52 with effect and if he fails to make his plea good shall answer all costs, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES EDWARD LEWIS,
By WM. H. BARNES, *His Att'y.*
WILLIAM H. BARNES.
JOHN H. MARTIN.

UNITED STATES OF AMERICA,
Territory of Arizona, County of Pima, } ss:

Wm. H. Barnes and John H. Martin, being duly sworn, depose and say each for himself that he is a resident and freeholder of the county of Pima, Arizona, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

WM. H. BARNES.
JOHN H. MARTIN.

Subscribed and sworn to before me this 27th day of April, A. D. 1893.

JOS. C. PERRY,
Notary Public, Pima County, Arizona.

The within bond is hereby approved this 3rd day of May, 1893.

HENRY C. GOODING,
Chief Justice.

(Endorsed:) No. 355. In the supreme court of Arizona. Cost bond on appeal to Supreme Court of the United States. Filed May 3, 1893. T. D. Hammond, clerk.

53 In the Supreme Court of the United States.

CHARLES EDWARD LEWIS, Plaintiff and *Appellee,*
vs.
PIMA COUNTY, Defendant and Appellee.

Citation.

THE UNITED STATES OF AMERICA:

To Pima County, Arizona Territory, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on the second Monday in October, A. D. 1893, pursuant to an appeal allowed by the honorable chief justice of the supreme court of Arizona on the 3rd day of May, A. D. 1893, from a judgment rendered in the supreme court of the Territory of Ari-

zona on the 14th day of May, A. D. 1893, in an action on appeal to that court, wherein you were the defendant and respondent and Charles Edward Lewis was plaintiff and appellant, to show cause why that said judgment in your favor should not be set aside, reversed, corrected, and speedy justice should not be done to
54 the party in whose behalf said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of May, A. D. 1893.

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

I, Frank H. Hereford, county attorney of The County of Pima, defendant in the above-entitled case, hereby acknowledge service of the above citation, a copy of the same having been served on me this 29th day of May, A. D. 1893.

FRANK H. HEREFORD,
District Attorney.

(Endorsed:) No. 355. In the Supreme Court of the United States. Citation of appeal. Filed May 30, 1893. T. D. Hammond, clerk.

55 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, T. D. Hammond, clerk of the supreme court of the Territory of Arizona, do hereby certify that the above and foregoing is a full, true, and correct transcript and copy of all the papers filed in the supreme court of the Territory of Arizona in the above-entitled action, wherein Charles Edward Lewis is plaintiff and appellant *versus* Pima County, defendant and appellee, as the same now remain of record in said court; also that the citation herewith and hereunto attached is the original citation issued by said supreme court of the Territory of Arizona.

Seal Supreme Court of Arizona.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 28th day of June, A. D. 1893.

T. D. HAMMOND, *Clerk.*

56 In the Supreme Court of the United States.

CHARLES EDWARD LEWIS, Plaintiff and Appellant,
vs.
PIMA COUNTY, Defendant and Appellee. } Citation.

THE UNITED STATES OF AMERICA:

To Pima County, Arizona Territory, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on the second Monday in October, A. D. 1893, pursuant to an appeal allowed by the honorable chief justice of the supreme court

of Arizona on the 3rd day of May, 1893, from a judgment rendered in the supreme court of the Territory of Arizona of the 14th day of April, A. D. 1893, in an action on appeal to that court, wherein you were the defendant and respondent and Charles Edward Lewis was plaintiff and appellant, to show cause why that said judgment in your favor should not be set aside, reversed, corrected, and speedy justice should not be done to the party in whose behalf said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of May, A. D. 1893.

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

57 I, Frank H. Hereford, county attorney of The County of Pima, defendant in the above-entitled case, hereby acknowledge service of the above citation, a copy of the same having been served on me this 29th day of May, A. D. 1893.

FRANK H. HEREFORD,
Dist. Att'y.

58 [Endorsed:] In the Supreme Court of the United States. Charles Edward Lewis, plaintiff & appellant, *vs.* Pima County, defendant & respondent. Citation of appeal. Filed May 30, 1893. T. D. Hammond, clerk.

Endorsed on cover: Case No. 15,352. Arizona Territory supreme court. Term No., 968. Charles Edward Lewis, appellant, *vs.* Pima County, Arizona Territory. Filed July 18, 1893.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES EDWARD LEWIS,
Plaintiff and Appellant,

vs.

THE COUNTY OF PIMA,
Defendant and Appellee.

BRIEF OF APPELLANT.

MAY IT PLEASE THE COURT:

This is a suit to recover upon a large number of coupons representing interest on bonds issued by the defendant.

There was a demurrer to the complaint, and the demurrer was sustained, and judgment for appellée.

The decision of the Court upon demurrer was, in the Supreme Court of Arizona, assigned for error, and is urged here.

The demurrer raises questions of the mere form of pleadings and also questions which go to the foundation of plaintiff's right of action.

The former were all decided by the Court below in favor of plaintiff, hence we do not refer to them.

As to the right of action, it was objected to that it is not alleged that the demands sued upon have been presented to the Board of Supervisors

within six months after due, as required under the general statute as to presentation of claims. The Court held that this was not necessary, as the coupon sued upon by its terms, is in effect a warrant upon the treasurer, signed by the Chairman of the Board and the Clerk.

In addition it was held that the Act providing for the issuance of the coupons directs the treasurer to pay the same when presented. The general statute must yield to this later special Act.

Also, a law enacted since the issuance of the bonds cannot affect them, and the re-enactment of the general statutes on the subject in 1887 does not apply to these bonds.

County of Green vs. Daniel, 12 Otto 187.

Shinbone vs. Randolph Co., 56 Ala. 183.

Lime Stone Co. vs. Rather, 48 Ala., 433.

It was also urged that a number of the coupons sued on, upon their face were due at a time before suit was brought to bar them by limitations. The Court held that the demurrer is good as to those counts for this reason. This we deny. Limitations is a defense to be set up by answer, and cannot be raised by demurrer.

The Statute seems to be clear, (Par. 2328) "The laws of limitations in this Territory shall not be made available to any person in any suit of the Courts of this Territory, unless it be specially set forth as a defense in his answer."

To such answer, the plaintiff could reply absence from the Territory (Par. 2324); as an acknowledgment of the debt in writing when the action appears to be barred by the statute (Par. 2327.)

These defenses could not be set up or proved against a demurrer, but could against a plea in bar, or an answer. It would be illogical to say that complainant having set up a promise barred by limitations, shall allege why the statute does

not apply to this promise. It does away with the doctrine that limitation is a personal plea in bar, to be specially pleaded by the party relying upon it. That without such a plea, it is waived. This was the common law (Chitty Pl. vol. 1, 473.)

In the code states where there is no statute such as Par. 2328, it has been held we admit, that the equity rule applies, and where the complaint distinctly shows the action to be barred, a demurrer will lie. Bliss Cole Pl. and cases cited, and note (Par. 335.)

In New York, North Carolina, South Carolina and Wisconsin it is enacted "That the objection can only be taken by answer."

Our statute *supra* "Shall not be made available to any person unless it be specially set forth as a defense in his answer" is even more clear. In those states it was held demurrer does not reach it. Bliss *supra*. It was particularly so held in—

Tarbox vs. Adams Co., 34 Wis., 560.

Sand vs. St. John, 36 Barb., 658.

Baldwin vs. Martin, 14 Abb. Pr. (N. S.) 9.

The new promise may be given in evidence without reply.

Easelstein vs. Weeks, 12 N. Y., 635.

Texas has a similar statute to our Par. 2328, and there it is held that the answer may be by "Exception or plea."

Sayles Tex. Pl. and Pr., Sec. 256 and cases cited.

But Sec. 33 (Sayles Tex. Stat.) provides that "the answer" may consist of dilatory pleas; of exceptions general and special; of general denial pleaded in due order of pleading. Our statute, Par. 734, materially differs, and the distinction is retained between demurrer, general and special, and the matters in bar of the action.

If limitations must be "specially set forth *as a defense* in answer" it certainly must mean in

bar, so that though no replication be required the plaintiff may give in evidence against limitations these facts which do away with the bar of the Act.

To hold that this may be reached by demurrer precludes that evidence.

It was next urged, that as the statute authorizing the issuing of the bonds is mandatory upon the county, it is void.

It was held by the Court, that while compulsory features of the law might be beyond the power of the legislature, yet, it was authority in the county to act. That even if the court might refuse by mandamus to compel the county to issue bonds, yet, if the county has voluntarily done so, the law gives the authority to do it, and the county cannot now be heard to dispute the power to do what has been done. This is sustained by authority.

Hasbreuck vs. Milwaukee 13, Wis. 53.
Bridgeport vs. R. R. Co. 15, Conn. 475.
R. R. Co. vs. Napa 30, Cal. 437.
R. R. Co. vs. Stockton 41, Cal. 169.

We come now to the main question in the case, upon which the court sustained the demurrer, and it is the question upon which the case must stand or fall.

The court held that the act upon which the bonds were issued is in violation of the Organic Act of Congress, and hence, in excess of the powers of the legislature.

The demurrer alleges that the act of Feb. 21st, 1883, under which these bonds were issued "confers upon the Narrow Gauge Railroad Company an especial privilege" forbidden by the Organic Act, Sec. 1889, R. S. U. S. which is as follows:

"The legislative assemblies of the several territories shall not grant private charters or especial privileges, but they may by general incorporation acts, permit persons

to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon-roads, irrigating ditches, or for colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any benevolent, charitable or scientific association."

This act prohibits the creation of private corporations and the granting of corporate franchises and privileges by special act and is a declaration that such franchises and privileges can be granted only by a general law. It means this and no more.

It does not prohibit the creating of public corporations or quasi-public corporations by special act. It is no violation of this act to create counties, fix the boundaries, or define the powers thereof, by special act.

This act does not grant any charter rights or franchises or privileges to this railroad company, it did not have without the act. This company was organized under the general railroad incorporation act of 1879 (Laws Ariz. 1879, p. 85). That act authorizes corporations to be formed by filing articles of association as provided for in the act, and among other things designating the termini of the proposed road.

When so formed the corporation—

"Shall be capable in law to make all contracts, acquire real and personal property etc. and be capable of suing and being sued etc. and generally to, possess all powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy.

"Sec. 15.—Shall have power to borrow such sums of money as may be necessary for the constructing etc. the road, and to issue bonds and notes therefor."

"Sec. 17.—It shall have capacity to sue and be sued; to make contracts; to acquire, hold and convey real and personal property necessary for the construction of the road, and for the purpose shall have all the rights, powers and privileges which are enjoyed by natural persons.

"Sec. 18.—Shall have the power to take, hold, and

convey same as a natural person such voluntary grants and donations of real and personal property as may be made to them to aid said road. To purchase and by voluntary grants and donations to receive and take all such lands and other property as the directors may deem necessary, proper and convenient for the construction of said road and for all other purposes necessary to said corporation."

Here are the grants of charter powers, franchises and privileges by general law to any company complying with its terms.

By that act this company had power to issue bonds and notes, and to contract with any person or corporation authorized by law to do so, for the benefit of the construction of the road, and to receive donations to that end. To issue its notes or bonds and exchange them for the bonds of another person or corporation, that might be more available to it.

By the general railroad act the railroad company had full and complete capacity to issue its bonds and to receive bonds of the county of Pima. No legislation was needed to enable it to do it.

Without legislative authority it would have been *ultra vires* for the county of Pima to issue its bonds. This act gave such legislative authority to the county. No more—no less.

The railroad company with full power so to do, issued its bonds to the extent of $150,000 secured by first mortgage on all of its assets, and delivered the same to the treasurer of the county, and now Pima county having received those bonds when called upon to pay the bonds of the county, says "our bonds are void. True, the act in question authorized the county to issue them. True, the general incorporation act authorized the railroad company to issue its bonds in exchange for other bonds. Yet, as the act authorizing the county to issue bonds, names this company as the party to whom they are to be delivered, it is void, as a special privilege or franchise to the railroad com-

pany."

If the county were seeking to foreclose its lien upon the assets of the railroad company, upon the bonds held by the county, it could not be said the railroad company is not bound.

The power of the railroad company is not found in this act, hence it was not *ultra vires* of the railroad company. The railroad company would be bound by its contract. It could not set up want of consideration in this, that the county bonds are void for the reason that the act of the county comes from a special privilege to the railroad company. If the county can assert its own want of power, because a special privilege is granted to the railroad company, we have the anomaly of one party bound by a contract, and the other not.

Courts are always slow to declare an act of the legislature to be void because unconstitutional, and if they can give such a construction to the act that it shall stand, that construction will obtain.

If it be in part prohibited and another part not, that part not prohibited shall stand.

In so far as this act gave legislative authority to the county to issue its bonds in aid of a certain railroad, it is not prohibited. If it be held, that in so far as it limited the means to the end, to the particular railroad company, it be a special privilege to that company, and so void, as to that feature of the law, then if this company had by mandamus sought to compel the issuing of the bonds, this unconstitutional feature might have been urged, and the writ denied on the ground that the county could not be compelled to deal with this company, by this company, as it could not assert this special privilege granted to it. But the law, being valid so far as it authorizes the county to aid in the construction of a certain rail-

road, and the county having voluntarily done so, it cannot be heard to say its act is void because of a special privilege to the company which it has selected to carry out the end desired, though it might have refused to do so.

In other words, though the railroad company might not assert its special privilege, if it be such, to exchange its bonds, the county having done so cannot assert that the act of the county is void because the railroad company could not have compelled the county to perform.

Evidently a doubt arose as to whether towns, cities or municipal corporations were included in this act, and so special laws as to them prohibited and to remove such doubt the act of June 8th, 1878 was enacted (Vol. 1, Sup. R. S. U. S. p. 337).

That act provided that Sec. 1889, shall not be construed to prohibit the creation of towns, cities or other municipal corporations by general or special acts.

It is not conceded that counties are included in the words "towns, cities or other municipal corporations." A municipal corporation strictly "is an incorporated city, town, village or burrough" Encyc. Law at Title.

A city (Mitchell vs. Franklin Co. 23 Ohio St. 143) or a village (Wahoo vs. Reeder (Neb,) 43 N. W. Rep. 1145) is a municipal corporation, but a school district is not (Heller vs. Stremmel 52, Mo. 309).

"A county is not (Ency. Law at Tit., note county)." It is in its very nature, character and purpose public, and a governmental agency or auxiliary rather than a corporation."

These are not in absence of statute, liable for negligence of officers, because they are an arm of the State which may not be sued.

Askew vs. Hale Co. 54, Ala. 630 [25 Am. R. 730].

In a large and broad sense, counties may be included in the term municipal corporations when it is desired to distinguish public and quasi-public corporations, from these purely private.

It is evident that in the act of 1878 it was not intended to include counties, school districts or townships and that class of corporations in the terms "towns, cities *or other* municipal corporations.

Had Congress intended it to be so, it would have said "counties, cities, towns or other municipal corporations." Having omitted "counties" it must mean "cities, towns or other (like) municipal corporations." That this is so, is found in the universal legislative construction, never disputed in all the territories, since these acts. Every session of those legislatures has passed special acts creating new counties, or changing the boundaries, authorizing particular counties to construct bridges or toll-roads or public buildings, or granting or withholding to county boards certain powers or requiring certain duties.

The definition of a county excludes it from Sec. 1889 *supra.*

The prohibition is against private charters and especial privileges. The creation of a new county is neither.

"A county is a political subdivision of the State or Territory and is organized as a part of the machinery of the government for the performance of functions of a public character."

"It is a local organization which, for the purpose of civil administration, is invested with a few functions of corporate existence." It is "A local subdivision of a State created by the sovereign power of that State, of its own will, without the particular solicitation, consent or concurrent action of the people who inhabit it.

Encyc. Law Tit. Counties Vol. 4, p. 343.

Barton Co. vs. Walser 47, Mo. 189.

Maury Co. vs. Lewis Co. 1, Swan (Tenn.) 236.

Granger vs. Pulaski Co. 26, Ark. 37.

Laramie Co. vs. Albany Co. 92, U. S. 307.

Dillon Muni. Corp, 4th Ed. Sec. 23 and cases cited.

Beach vs. Leahy 11, Kas. 23.

County of Sherman vs. Simonis 109, U. S. 735

Hence, we conclude that by Sec. 1889, R.S. U. S. the legislature is not prohibited from governing or controlling counties by special acts. The act of 1878 *supra* construing that act as to "towns, cities and other municipalities" cannot be held to legislate into Sec. 1889, what was not in it before.

It purports to be a legislative construction of the act and more. The last clause says:

"But nothing herein shall have the effect to authorize any *such* (town, city or other municipal corporation) incorporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs.

The second clause of the act validates general and special acts heretofore passed as to cities, towns or other municipal corporations, and there is added "but nothing herein," etc.

Much stress was laid upon this in the court below. In fact the decision of the court is based on the construction that this prohibits the legislature from authorizing "towns, cities" and counties, as "other municipalities" from creating any debt other than such as shall be necessary to the administration of its internal affairs," and that as the county could exist without the railroad it was not "necessary."

If this is what is meant, it prohibits as well by general as special law. Who shall say what is necessary? Counties can exist without court-houses, highways or bridges. Necessary for its internal affairs means, for the successful and wise administration thereof. Court-houses, roads, bridges and such things, are necessary for wise ad-

ministration, and the legislature is the judge of such necessity, and it may do so by general or special act unless the special form of legislation be prohibited, which this act of 1878 does not purport to do.

This construttion proves too much and is absurd. The act simply construes section 1889 and declares acts heretofore passed, the validity of which might be doubted by another construction, to be valid and adds, "nothing herein shall have the effect," etc:

It is absurd to say, that these words absolutely prohibit the legislature from authorizing counties to incur debt which the court shall think not necessary to the administration of its internal affairs. Roads, highways and railways constructed within the county, as this was is an internal affair.

I conclude therefore that it is not a violation of the Organic Act of the territories, viz: Sections 1889, R. S. U. S. and the section as amended by the act of 1878 *supra*, for the legislature to provide by general or *special* act that counties, or a particular county may build a court house, a bridge, lay out and maintain a highway and build or aid in the building of railways.

I apprehend that we may now assume that an act authorizing the county of Pima to issue its bonds to any railroad company which shall construct a railroad between named termini, is not in conflict with Sec. 1889. Such an act would be a special act and not general, but it would not be a grant of a private charter or especial privilege. A county in its capacity as agent of the state and a subdivision thereof, cannot hold a private charter or enjoy an especial privilege. That can only be by a person or private corporation.

In so far therefore, as the act upon which the bonds were issued authorized the *county* to issue

them, and to make the contract provided for in the act, it is not prohibited by the Organic Act.

The title of the act is "an act to promote the construction of a certain railroad" [laws 1883, p. 61]. Not to aid a particular railroad company. There is a broad distinction here.

The legislature in its wisdom wanted a certain railroad constructed. The public needs demanded it. It had the right to provide for the construction of the same by the territory, or by any of the agencies or subdivisions of the territory. The means to secure the construction of the road are provided in the act.

We set the same out in full as an appendix to this brief.

Section 1 provides, that upon information to the chairman of the County Board by the President of the Arizona Narrow Guage Railroad Company a corporation, which filed its articles a certain date, that said R. R. Co. is ready to exchange bonds with said county, the chairman shall call his board together and they shall order 200, 20 year 7 per cent bonds of $1000 each with coupons attached, to be executed and delivered to the treasurer of the county to be disposed of as by the act provided.

Sec. 2, provides, that upon the application of the railroad company and a tender of $50,000 of the first mortgage bonds of said railroad company of like interest, etc., the treasurer shall deliver $50,000 of county bonds to the railroad company in exchange, and as five miles are completed, shall exchange a like amount.

Sec. 3 provides for the form of the county bonds.

Sec. 4 provides for a tax to pay interest, etc.

Sec. 5 provides that said bonds of the railroad company shall be secured by deed of trust on all property of the company now owned or here-

after to be acquired, and all franchises and privileges which shall be a first mortgage, and not to exceed $13,000 per mile, etc.

Sec. 6 authorizes the county to sell the railroad bonds.

Sec. 7 provides for redeeming county bonds with any revenue in excess of interest.

Sec. 8 provides for subsequent meetings of county board if necessary.

Sec. 9 provides that a copy of the articles of association certified by the secretary of the territory, of the A. N. G. R. R. Co. filed Nov. 23rd, 1882 shall identify the said railroad company. The route of said road shall conform to the route set forth in said articles.

It was urged below that this act is in violation of the Organic Act aforesaid and beyond the power of the legisiature, because it confers an especial previlege upon the said railroad company.

We deny this. The term "special privilege" in this connection is synonomous with "franchise."

"Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the county generally, of common right."

Encyc. law Vol. 8, p. 585.

Bank of Augusta vs. Earle 13, Peters 595.

Canal Co. vs. R. R. Co., 11 Leigh (Ver.) 42.

Privileges conferred by grant from government, 3rd Kent. Com. 458.

The county has exercised a power clearly granted by the act in question, and the railroad company a power clearly granted to it by the general incorporation act. Though it be held that the railroad company might not have insisted upon the county making this contract with that county as seeking to enforce an "especial privilege" yet, having voluntarily made the contract it might have refused to make, no "especial privilege" was resorted to.

It was not necessary. The county resorted to

its power to contract, to contract with this company. This construction is plain and clear and validates, rather than invalidates, the law.

We deny, however, that this is an "especial privilege" in the railroad company.

Aspinwall vs. Dorris County, 63 U. S. (22 How.) 364.

In that case it was held that where in a special Act incorporating a railroad company, power was given to counties to subscribe for stock in aid, and before the subscription had been actually made the Constitution of Indiana prohibited such aid, that this power given the counties was not a contract between the State or counties and the railroad, and hence the power could be taken away by the Constitution. That is, this power in the Act was not a charter franchise or privilege of the railroad company.

"The power or authority contained in the charter, and out of which the right in question claimed to arise, is conferred upon the county, a public corporation or civil institution of government and upon public officers employed in administering laws; and the power or authority itself concerns this body in its public political capacity."

The grounds upon which this case is based go to the very point involved here, whether this power to the counties was a grant of charter rights, or special privilege, or franchise of the railroad company.

Against this view, the following cases were cited below:

Smith vs. County of Clark, 54 Mo., 59.

H. & St J. R. R. Co. vs. Marion Co., 36 Mo., 295.

The former case was this: The charter of a railway company provided that counties were authorized to subscribe to the capital stock of the company. It was afterwards enacted that in a charter to a new company, that the new company

should be entitled to all the privileges, rights and immunities which were granted to the former, as fully and completely as if the same were re-enacted.

It was urged in argument, that the grant to the first charter, of the right of the counties to subscribe, was a privilege, right and immunity, in this—that it was a grant to it of the right that counties should be stockholders; that this is a part of the body corporate. The Court held that it was the undoubted intention of the Act to authorize counties to subscribe to the stock of the new company, and that they would construe the power transferred by the words used. This was evident and clear. It was not the important question in the case and in the opinion denying a rehearing the Court re-states what is decided, and does not include this.

It was not necessary to the case to decidetha t the grant of power was a special privilege in the railroad company. All that was decided is, that the new company took the place of the former; succeeded to it, and became the company whose stock the county was authorized to subscribe for. It was rather matter of identity, than transfer of privileges or rights. It may be, however, that the grant of a right to a county to become a stockholder and incorporator in a private corporation is a charter right or special privilege in the railroad company when the power to make a contract to exchange bonds with a corporation whose stock it is not empowered to hold, would not be such privilege. At best the reasoning of this case is *dictum*.

The Marion County case above, held that by the second special Act a new company succeeded to the former, and that the powers granted in the former Act to the counties to subscribe for stock in that company, existed in the new. This was

not here the main question in the case. It was clear that it was the evident intention of the legislature by the last Act to give counties the power to become stockholders in the new company created; but the Court said the later Act provided that the subscription shall be valid if approved hereafter by County Court, and that was done, and the validity of bonds is based on this idea.

These cases holding that bonds, voted to one company may be delivered to a company formed by consolidation under then existing statutes are valid, were also cited.

Buffalo vs Cambria Iron Co. 105 U.S. p. 73 and cases cited.

But by the authority of Harshman vs Bates Co. 92 U.S. 569 had there been no vote to the former company the extinction of that company worked a revocation of the power.

In the Marion case above, the subscription had been made under the old Act.

Where there has been a vote to issue bonds to aid a railroad company, and upon faith of such vote under a law authorizing it, a new company is formed to take the bonds and carry out the undertaking, the power has become to that extent executed, and by that act a right exists in the former company which it may enforce, and that is the right which is invested in the consolidated company to enforce, not the charter privilege existing in it.

These cases therefore do not hold that an Act authorizing a county to exchange its bonds with a particular named company to aid the construction of a certain railroad is a charter right or a franchise or an especial privilege of the railroad company.

But Scotland vs Thomas, 94 U. S. 682, took a broader and more general view. It is there said that it was a great public improvement that was

sought. The powers of adjacent counties to subscribe to the stock of a company to secure its construction was desired not only by the company but by the inhabitants. By the subscription the counties became stockholders with powers over the control of the company to direct it and so give it credit.

Why this power to subscribe to the company constructing this portion of the road should not still attach as one of the rights and privileges belonging to it into whose hands soever it comes by consolidation or otherwise, it is difficult to see. It is the public purpose sought to be accomplished, which is the power invoked here, rather than the particular corporation which may be the agency to accomplish it, which is in mind, and, while the argument to sustain the exercise of the power and the validity of the bonds seems to include a right, privilege, and immunity transferred from the old to the new railroad company, it amounts to no more than a decision that the consolidated company is the same identity which the county is authorized to subscribe to, to secure the same proposed public improvement rather than that there has been any transfer of any charter rights or especial privileges in this particular.

We must, after all come back to the discussion raised here, not disputed in these cases, in the questions decided, whether authority given to a county by law to exchange its bonds to aid the construction of a certain railroad with a company authorized by legislation outside this Act to do so, and to issue its bonds and negotiate and sell them for this purpose is a especial privilege of this company.

The cases above cited, all of them, are cases where the Act created the railroad company and gave it all its corporate powers and privileges and

among other provisions of the Act, power to counties to aid is included. They simply hold that a consolidation preserves all those powers and privileges in the new company created by the consolidation.

At best those cases are but analogies and as analogies they are not authority against our position.

There is another class of cases which may aid us—

Des Moines Ry vs Des Moines B. G. Co. 33 N. W. 611 (73 Iowa 513)

This case holds, that an ordinance of the city granting to a particular company the exclusive right to operate Street Railways on all its streets, for the term of thirty years, is but a contract, not in violation of the constitution of Iowa, which says: No exclusive privileges shall ever be granted.

That this clause limits the powers and rights which a body of men might claim as a corporation. That the right to operate street railways was not a corporate right. That an individual might obtain and enjoy the right. So here, the construction of a railroad is not a corporate right, and the right to contract with the County for its construction was not a franchise or especial privilege granted by this law.

Ry Co. The People 73 111. 548.

An ordinance granting to a particular railroad company the right to lay its tracks and operate them on a certain street, does not grant an especial privilege or franchise and hence, is not void as prohibited by the Constitution. It was a mere license and within no definition of a franchise. The company did not derive its power to construct the railroad from the ordinance. That power was conferred by its charter. The city simply said upon what terms it might do so in a certain street; so in the case at bar, the County said to the Company, if you will do a cer-

tain thing, the County will issue to you its bonds, and the Act authorized the County to do it. The railroad company by its charter had the power to do it.

The case of The K. U. Ry vs County of Bourbon 2 S. W. 688 clearly and positively holds that a law which authorized the county to subscribe to the stock of a particular railroad company, is not a grant of any exclusive privilege or immunity in the railroad company—"It does not confer directly or indirectly a personal privilege in the meaning of the constitution".

We conclude therefore that the bonds of the County are valid binding obligations of the County, as the County had authority to issue them for the purpose for which they were issued, and this action should be maintained upon past due coupons. That their delivery to this Company under the authority of the law, in exchange for its bonds, was not by virtue of charter grant or especial privilege or franchise to the Company, and so, not void.

Respectfully submitted.

WM. H. BARNES.

Attorney for Appellant,

ROSSINGTON, SMITH & DALLAS,

of Counsel.

APPENDIX.

An Act to promote the construction of a certain railroad.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

Section 1.—Upon information in writing to the Chairman of the Board of Supervisors of Pima County, Arizona Territory, by the President of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the Secretary of said Territory, on the 23rd day of November A. D. 1882, that said railroad company is ready to exchange with the said County of Pima, according to the provisions of this Act, it shall be the duty of the Chairman, and he is hereby directed to call a meeting of said Board, to be held within five days after the receipt of said notification, and it shall be the duty of said Board of Supervisors, and they are hereby directed to meet within five days, at the county seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said County, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds and the interest coupons attached thereto shall be signed by said Chairman and the Clerk of said Board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the Clerk of said Board to the County Treasurer of said County of Pima, to be by him disposed of as hereinafter provided, and said County Treasurer shall receipt to the said Clerk for the said bonds.

Sec. 2—Upon the application of said railroad company to the said Treasurer, and the tender by said company of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said County, it shall be the duty of said Treasurer and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the President and Secretary of said railroad company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as five miles each of said railroad shall have been graded, laid with ties and iron, said Treasurer shall upon proof thereof,

which proof shall be the certificate of the County Surveyor to that effect, exchange with the said President and Secretary of said railroad company fifty thousand dollars of said bonds of Pima County for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company.

Sec. 3—The said bonds herein provided to be issued by the said County of Pima shall be issued in the name of said county, and shall be made payable to bearer twenty years after date, at the office of the County Treasurer of said county issuing the same. The said bonds and coupons, in addition to being signed by the Chairman and Clerk of the Board of Supervisors of said County, shall also be signed by the Recorder of said County, who shall affix to each bond the seal of his office.

Sec. 4—The said Board of Supervisors of Pima County, issuing bonds as aforesaid, are hereby authorized and directed, at their first regular meeting, after the issuance of the same, and in each year thereafter, until the said bonds are paid, in case there should not be sufficient moneys in the railroad funds provided for, to pay the annual interest upon said bonds, to levy for each year a tax sufficient to meet any deficiency in said railroad fund to pay said interest, which tax however, shall not be more then twenty cents upon each one hundred dollars of taxable property in the above named county, which tax shall be levied and collected in the manner as is, or may hereafter be provided by law for the levying and collecting of other Territorial and County taxes in said county, and which tax shall be known as the railroad deficiency interest tax, and the proceeds of said tax, together with the interest received by said County on the bonds of said railroad company, held by said county, shall constitute a fund to be applied only to the payments of the interest on and redemption of the bonds provided for in this Act to be issued by said county, and shall constitute the fund heretofore mentioned and be known as the Railroad Fund.

Sec. 5—The bonds of said railroad company hereinbefore provided for to be tendered and exchanged for the bonds of Pima County shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including also, all franchises

and privileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company, and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached, and shall be made payable, both principal and interest, at the office of said company in the City of Tucson, in the County of Pima. And said deed of trust or mortgage shall provide that no more bonds than to the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company.

Sec. 6—Whenever in the judgment of the Board of Supervisors of Pima County, it may be deemed advisable to sell any or all of the bonds of said railroad company, received in exchange by them, as aforesaid, they are hereby authorized and empowered to direct the Treasurer of said county to advertise in a newspaper published in said county for the space of four weeks, for sealed proposals for the purchase of any or all of said bonds of said railroad company; and ten days after the said notice shall have been published as aforesaid the Treasurer shall open the said proposals, and shall sell said bonds to the highest bidder therefor, in such lots as he may be directed by said Board of Supervisors, and the proceeds of such sale shall be placed in the said Railroad Fund to pay the interest and principal on the respective bonds of the said county; PROVIDED HOWEVER, that the Treasurer may reject any and all bids; AND PROVIDED FURTHER, that no sale of such bonds shall be concluded until confirmed and approved by the Board of Supervisors by an order entered upon its minutes.

Sec. 7.—Whenever, after the payment out of said Railroad Fund of the semi-annual interest on the said bonds, there shall be any money left in said Railroad Fund, it shall be the duty of the Treasurer of said County, to advertise in a newspaper published in said County for the space of four weeks, for sealed proposals to surrender any of the bonds of the said county, and ten days after such notice shall have been published as aforesaid, the Treasurer shall open the said proposals, and shall redeem the bonds of said county, so far as the said fund on hand may be sufficient; PROVIDED, those offered to be surrendered at the lowest rates, shall be redeemed first; AND PROVIDED FURTHER, that none shall be

153-54

RECORD, CASE No. 15,352.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM No. 968. JJD

CHARLES EDWARD LEWIS, APPELLANT,

vs.

PIMA COUNTY, ARIZONA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

APPELLEE'S ARGUMENT

RECORD, CASE No. 15,352.

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VS.

PIMA COUNTY, ARIZONA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

I.

In the District Court of Pima County, Arizona, appellant brought his suit against appelee to recover on a large lot of coupons cut from bonds made by appellee in obediance to the commands contained in an act of the territorial legislature, approved February 21, 1883, and set out in an appendix to appellant's brief *totiden verbis*.

To appellant's complaint appellee demurred, alleging divers grounds therefor. This demurrer was sustained by the District Court. Appellant elected to stand by his complaint, and judgment for appellee was accordingly rendered. From this judgment appellant appealed to the Supreme Court of the Territory, where the judgment was affirmed. He then appealed to this Court.

If therefore the complaint is obnoxious to the demurrer, then the judgment must again be affirmed.

I will content myself, in this Court, with but three out of the many reasons urged against the complaint, and these are:

1. Assuming that the legislative act, instructing that the bonds be issued, is valid, does the complaint state facts sufficient to constitute a cause of action?

2. The legislative act being mandatory, is it therefore void?

3. Does the act in question confer an especial privilege?

II.

Assuming that the legislative act, instructing that the bonds be issued, is valid, does the complaint state facts sufficient to constitute a cause of action?

Fundamentally no municipality can issue bonds without statutory authority so to do.

Young v. Clarendon, 132 U. S. 346.

Ottaway v. Carey, 108 U. S. 123.

Police v. Brittian, 15 Wall. 589.

Two things therefore follow this fundamental proposition, —that the act is a part of of the bond, and that the plea of *ultra vires* is ever a good plea.

The Arizona statutes do not provide that an exhibit to a complaint can be made a part of the pleading by referenee made thereto in the complaint. The statute requires that the pleading on behalf of the plaintiff shall be "a full and clear statement of the cause of action." It also requires the defendant to file all his defenses at the same time, whether of law or of fact. He therefore files his demurrer and pleas together, the latter not waiving the former.

The pleading under consideration, in so far as the bond itself is concerned, contents itself with the following averments, namely:

That on the first day of July, A. D. 1883, in the city of Tucson, in the county of Pima, in the Territory of Arizona, the said defendant made and issued its certain bond, dated on said date, whereby, for value received, the said defendant, The County of Pima, promised to pay to the Arizona Narrow Guage Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, 1903, the sum of one thousand dollars, lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of said Pima county semi-annually on the first days of January

and July of each year, on presentation and surrender of certain interest coupon, thereunto attached.

That it was recited upon the face of said bond as follows:

"This bond is issued by the board of supervisors of said county of Pima under and by virtue of an act of the legislature of Arizona, entitled, 'An act to promote the construction of a certain railroad,' passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof, the 21st day of February, A. D. 1883, and this bond is one of a series of two hundred issued in pursuance to said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest and running like time as the bonds of which this is one."

Which bond, in order to distinguish it from others of like chacter, was marked No. 1. A copy of said bond, except as to number, is hereunto attached, marked "Exhibit A," and made a part hereof.

That attached thereto was, among others, a certain interest coupon, made by the said Pima county, whereby it promised to pay to bearer, "on the first day of January, 1884, at the county treasurer's office at Tucson, thirty-five dollars, being interest due on bond No. 1," which coupon is in words and figures as follows, to wit:

It will be noted that the conditions precedent to the delivery of the bonds are not alleged, nor that the bonds were ever delivered. It may be claimed that these are averred by the recital that is copied in the complaint; but, I submit, the recital cannot perform this office. The complaint says that "it was recited upon the face of said bond as follows." Then follows the recital. Does it follow from this statement that the recital is a part of the bond? Does it follow from this that the recital was "recited upon the face of said bond" by anyone having authority to so recite? The statute, under and by virtue of which the bond is purported to have been made, does not provide for any recital "on the face of the bond," or else-

where. It is not alleged in this complaint that this recital is a part of the bond, is included in the signatures thereto, nor that the recital was made by or with the authority of the signers thereof.

Independent of this, the recital itself signifies nothing. It simply says that the bond "is issued by the board of supervisors" by virtue of the statute named. This statute provides that these bonds shall be "signed by the chairman and clerk of the board of supervisors of said county, shall also be signed by the recorder of said county, who shall affix to each bond the seal of his office." (Sec. 3.) The statute further provides (Sec. 1.) that these bonds shall "be delivered by the clerk of said board to the county treasnrer of said county of Pima, to be by him disposed of as hereinafter provided." The "hereinafter provided" is a command that he shall deliver them to the railway company upon the happening of certain things. It follows from this that the county recorder may have never signed or sealed one of them; that they may have been stolen from the county treasurer, and thus came into the hands of the appellant; and that not one of the conditions, upon the happening of which the escrow was authorized to deliver, has ever been fullfilled. The recital, whatsoever dignity may be given to it, does not bar the way to either of these propositions, because it is not in conflict with either of them.

In the case of *Merrill v. Monticello*, (138 U. S. 686) this court has said:

> No incorporated town shall have the power to borrow money, or incur any debt; unless certain condition precedent are complied with. The conditions which the statute

prescribes the statute means to be performed. There can be no legal borrowing, unless the statute is strictly followed. What does it prescribe? That there must be first a petition to the town trustees, which shall be signed by the citizen owners of at least five eighths of the taxable property of the town, whose signatures shall be verified by an affidavit to the petition. The prayer of the petition is required to be that the board of trustees shall contract such debt or loan. The board would not depart, in its action, from this legally required prayer of the petition without transcending its authority, and acting *ultra vires.*"

In *Young v. Clarendon Township*, (*132 U. S. 340-347*,) the Court says:

"Even where there is authority to aid a railroad, and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds, except subject to the restrictions and directions of the enabling act."

The act under which it is claimed these bonds were issued contains certain mandatory requirements as precedent to their issue and delivery. If the act is to be given the construction contended for by the learned gentleman on the other side, and that which the lower court gave it, then it must be that it is no more nor less than an authorization to the county to exchange its bonds for the bonds of the railway company. Because the county must have statutory authority to issue bonds it necessarily follows that the act itself is a part of the bond, and the holder therof, wheresoever he may be, and in whatsoever market he may purchase the bond, takes it with full knowledge of the act authorizing its issue. The authorities as to this proposition I will cite later. If, therefore, the act is a mere authorization to issue, and a mere authorization to deliver, the condi-

tions of the act are the conditions of the bond, and the conditions preceding delivery are also the conditions of the bond. This act contains five conditions, each of which are conditions precedent; that is to say, each of them must precede the authority to deliver the bonds; and, of course, it is the delivery which makes the bond. These conditions precedent are as follows:

1. That sections of the road must be completed before the bonds can be delivered, after the delivery of the first fifty thousand dollars.

2. That the railway company shall make and deliver its bonds to the county before the bonds of the county could be delivered to the railway company.

3. That the bonds of the county must be signed by the chairman of its board of supervisors and its clerk; that they must be made in the name of the county, and that they must also be signed by the recorder of the county, with the seal of his office attached.

4. That when so made they shall be delivered to the county treasurer, and be by him delivered to the railway company only upon the happening of certain conditions.

5. That these conditions are that a certificate by the county surveyor must be made, and by be him signed, that the road is constructed and the number of miles that are constructed; and this written statement must be delivered to the county treasurer, together with a certain amount in the bonds of the railway company, whereupon the treasurer is authorized to deliver to the railway company a like amount in the said bonds of the county.

Were any or either of these conditions complied with? The complaint is silent. If this command of the legislature

upon Pima county is a mere authorization, then it is an authorization conditioned upon the happening of certain things. If these things did not happen, then the authority does not and never did exist. When we plead *ultra vires*, the learned counsel refers us to this command, and we say this is a naked command; but he smilingly assures us that the lesser is included in the greater, just as an assault is included in the charge of murder. If then it be a simple authority to do if certain other things are done, does not the authority sleep until those things are done?

Says Mr. Justice Matthews, in *Bissel v. Spring Valley Township*, (*110 U. S. 169*): "But it is sufficient to say, that the power of the board of county commissioners to bind the township is conferred by the statute to be exercised only in the mode pointed out, and the attesting signature of the clerk is as material to the integrity and validity of the bonds as is that of the chairman of the board of county commissioners. The township had no power to bind itself for the purpose of aiding in the construction of a railroad, by subscription to its capital stock and the issue of bonds to pay for the same, except as authorized by this statute; the board of county commissioners did not represent the township for any other purpose, and could not execute its power to issue bonds by instruments not conforming to the substantial requirements of the law. *That law required the bonds to be executed in a particular manner, and the signature of the clerk is essential to the valid execution of them, even though he had no discretion to withhold it.*"

In the case of *Anthony v. County of Jasper*, (*101 U. S. 697*), Mr. Chief Justice Waite said: "Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find in the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no

legal liability can be created. When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of State. In other words, that officer was to certify them before their execution was complete, so as bind the public for their payment. We had occasion to consider in *McGarraban v. Mining Company*, (*96 U. S. 316*), the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. The same rule applies here. The object to be accomplished is the completion of a valid instrument, such as the law authorizes public officers to put out and bind, for the payment of money, the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the auditor of State. Of this law all who deal in the bonds are bound to take notice.

In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law."

In this case, as in that, would it not be necessary, for the plaintiff to recover, for him to first prove that the coupons sued on had been cut from bonds that "had been executed according to law?" And must he not allege the facts that constitute his cause of action?

The Arizona Code provides:

"The complaint shall set forth clearly the names of the parties and their residence, if known, with a full and clear statement of the cause of action, without any distinction between suits at

law and in equity, and shall also state the nature of the relief which he requests of the court."

Rev. St. 1887, pg. 668.

"It is laid down as a rule that the complaint must contain all the facts which, upon a general denial, the plaintiff will be bound to prove in the first instance, to protect himself from a non-suit, and show himself entitled to a judgment." (*1. Este's Pldg., 151*).

The statute, if it be a law, distinctly provides that the bonds must be executed in a certain way. This court has told us that each of the ways pointed out for the execution of the bonds is mandatory, and each must be obeyed, or it is not the bond of the municipality. And in the same case the court adds the decisive words: "In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law." In that case the law required the auditor of State to certify to them, and this had not been done. It was held that they were not the bonds of the municipality. In this case the act requires that they be:—"The said bonds and coupons, in addition to being signed by the chairman and clerk of the board of supervisors shall also be signed by the recorder of said county, who shall affix to each bond the seal of his office." (*Sec. 3*). Must he not prove that the bond was signed by the recorder in order to recover? And if he must prove it, must he not allege it?

Without going into the details of the various things made essential by this act to make a binding bond, on the assumption

that the act in question is a statute, I will beg leave to refer only to one more of these conditions, well knowing that one material failure is as fatal as any number of them.

The act requires that these bonds shall, within thirty days, be delivered into the hands of the county treasurer, and further provides:

"And whenever and as often as five miles each of said railroad shall have been graded, laid with ties and iron, said treasurer shall, upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the president and secretary of said railroad company fifty thousand dollars of said bonds of Pima County for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima county are exchanged for a like number of bonds of said railroad company."

Here is a clear and unmistakable condition precedent to the delivery of the bonds. The treasurer is the holder of the bonds in escrow. He can only deliver them on the terms of his escrow. These terms are that a certificate shall be presented to him by the county surveyor, reciting certain things and signed by him. Any other delivery would be void. Delivery is as essential to the making of a binding bond as is the signature. Must he not prove them to have been delivered? And if he must prove this must he not allege it?

In the case of *Young v. Clarendon* (*132 U. S. 352*), the court say: "As already shown, the legislature in this class of cases has the right to provide the process by which the contract is to be perfected. Moreover, we do not think these details are either useless or technical. When it is remembered that the whole policy of allowing contracts of this class has been deprecated by some of the oldest publicists and jurists, and that the negotiable form of such bonds has often lead to the imposition

of great burdens on municipalities for which there has been no return, we are not disposed to criticise the care of a legislature to establish a system of even rather severe checks as a condition to its concession of such extraordinary powers.

"The appellant claims that the bonds were perfected instruments when delivered to the State treasurer—that the ministerial duties had been performed in full. The argument proceeds largely upon the idea that as to this transaction, the township and its agents, the supervisor and clerk, were a complete and rounded organism, distinct from the State treasurer, and capable of dealing with the treasurer as if he were a third party in making delivery to him, for instance. We do not so regard it. All the steps directed by the statute to be taken leading up to the final act of delivery to the railroad company constitute one progressive process. To adopt the language of the court in the *McGarhan case. supra*, 'each and every one of the integral parts of the execution is essential to the validity of the bond.'

"We hold, therefore, that, since the bonds were never indorsed and delivered by the treasurer as required by the statute, they never became operative. The act of delivery is essential to any deed, bond or note. Although drawn and signed, so long as it is undelivered it is a nulity; not only does it take effect *by* delivery, but also only *on* delivery."

It foliows from this that the county treasurer could only deliver the bonds upon the happening of the conditions precedent which alone authorized him to deliver them. If the bonds had been stolen from the county would the county be bound to pay for them?

Portsmouth Savings Bank v. Village of Ashley, 52 N. W. Rep. 74.

And so we insist that it is our right to exact from the plaintiff a plain statement of all things necessary for him to prove in

order to entitle him to a judgment, and that among these things is the one that he has a bond signed and sealed as the law directs, and another is that he has a bond that has been delivered as the law directs, and under the circumstances that alone authorize its delivery.

I therefore submit, that this complaint does not state facts sufficient to constitute a cause of action; and that the judgment of the lower court must be affirmed for this reason, if for no other; for there is no averment in this complaint that the bonds were ever made by the county or delivered by it under and by virtue of, nor pursuant to, this extraordinary act.

III.

THE LEGISLATIVE ACT BEING MANDATORY, IS IT THEREFORE VOID?

Section 1 of the legislative act under consideration, is as follows:

"Upon information in writing to the chairman of the Board of Supervisors of Pima county, Arizona territory, by the President of the Arizona Narrow Guage Railroad Company, the corporation of that name which filed its articles of association with the secretary of the territory on the 23d day of November, A. D. 1882; that said railroad company is ready to exchange with the said county of Pima, according to the provisions of this act, it *shall be the duty* of the chairman, and *he is hereby directed* to call a meeting of said board, to be held in five days after the receipt of said notification, and *it shall be the duty of said board of supervisors, and they are hereby directed* to meet within five days, at the county seat of said county, *and then and there to order issued two hundred thousand dollars of bonds of said county*, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent per annum, interest payable semi-annually, the principal

payable in twenty years, which said bonds, and the interest coupons attached thereto, shall be signed by the said chairman and the clerk of said board. *and shall, within thirty days after the order of issuance has been made*, be delivered by the clerk of said board to the county treasurer of said county of Pima, *to be by him disposed of as hereinafter provided*, and said county treasurer *shall* receipt to the said clerk for the said bonds."

Section 2 of said act provides:

"Upon application of said railroad company to said treasurer, and the tender of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, *it shall be the duty of said treasurer, and he is hereby directed to deliver fifty thousand dollars* of bonds of said county to the president and secretary of said company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided," etc.

I have quoted the above sections for the purpose of emphasizing the statement that this so-called law is mandatory. That as to this there can be and is no question whatsoever. It is a plain and naked command. It attaches to this command no conditions wherein discretion, good faith, honest purpose, ability to do, or kindred things, can be weighed or considered. It does not say, if agreeable to you. It fails to show the courtesy usual in such cases, of saying if it meets with your good pleasure. Whether the ones who were to pay these bonds were agreeable to their issue, or whether their representatives on the board deemed their issue best, or wise, or judicious, were questions not submitted. The legislature was kind enough to save the people of the county, and their representatives, all trouble in this respect. As the honest servants of the people, they took up these little items, one by one, and one by one they

solved them. All that was graciously left for the taxpayer to do was to put his hands deep into his pockets to pay the bonds that all their representatives had to do was to issue and deliver.

Truly we are a great country and a great people! I venture the assertion that, of all the legislative assemblies in our entire country, Arizona alone could be depended upon to exhibit such zeal, and to expend such energy, in taking the affairs of the people out of their own hands, and settling and adjusting them, just, of course, to save the people the bother and worry of settling them for themselves.

The history of municipal aid bonds has been an unhappy one to the municipalities issuing them. But these bonds have been sustained, and their payment exacted, because they were a contract, and being negotiable defenses could not be heard against innocent holders for value. But the bond must be a contract. The logic of all the decisions of this court on these bonds rigidly adheres to this; for the sum of all these decisions is that the legislature grants the municipality the authority to make the contract and to issue the bonds in pursuance thereof. The officers of the municipality, as the representatives and agents of its people, and by them thereunto authorized, decide: 1, whether a contract shall be made; 2, if so, to what amouut; and 3, on what terms and conditions. All that the law does for them, all that it can do for them, is to say to the municipality, through and by your officers, as your agents, you may decide whether you will contract or not; and if yes, you alone shall decide what the terms and conditions of your contract shall be, fixing therefor only a maximum.

A moment's consideration will show that this is the most that can be done; for otherwise it would amount to legislating

the money of the taxpayer out of his pocket and into the pocket of the private enterprise. This of course cannot be done, and therefore the former course, for arriving at the same result, was adopted. This course was sustained by the courts on the single theory of an authorized contract, made between the municipality and the enterprise, both getting authority from legislative grant. It being sustained as an authorized contract, one made and entered into between the parties, the requisite elements of a contract must exist, else the act would be appropriation and confiscation. That is to say, the people of the municipality, to whom alone belongs the pleasure of paying the bonds, must agree to them and must make them. This they do in some cases by an election of the people, and in others by the officers of the municipality as their agents duly authorized.

Viewed in this light, the only true and logical one, how does this law look to us?

What discretion does it vest in the people of Pima county as to the amount of indebtedness they shall incur in aiding this company?

What discretion does it vest in them as to whether they shall incur any indebtedness at all or not?

What discretion does it vest in them, if they decide the road is needed, and that the aid is advisable, whether it shall be extended to the company named, or to some rival company?

The law is not uncertain. It is a command to do. Under this command, what discretion does it vest in the people of Pima county whether they shall issue these bonds or not?

No such discretion is given. Each point named is supplemented with a command to do, and what, and how to do.

What effect do such commands, coming from such a source, have upon a board of supervisors, composed, as they are, of men unlearned in the law, uncertain of their rights, uncertain of their duties, and who are sworn to obey the law? Can any one answer the question? Is it a truthful answer to say that they had no more effect than they ought, in the eyes of the law, to have had? This may be dangerous ground.

But, says my brother Barnes, a command to do is an authorization to do; one cannot command a thing to be done without authorizing it to be done.

Upon this theory, what is authorized to be done by this act? To make a contract with a named company whereby the county shall exchange its credit of two hundred thousand dollars for the credit of the railway company for a like amount; and this authorization is coupled with the command that the contract thus authorized shall be made. A big man seizes a little one, tells him to loan him ten dollars for thirty days, and tells him in staring big letters. The little man is thereby authorized to make the loan, but the authorization comes with a command in which there is a ring of war. Is this a contract made under duress, if the money be advanced? Is it a good answer to tell the little man that, under the law, he did not have to do it? The single purpose of the legislature in making its command was to compell the exchange of credit. It was made with the expectation that it would be obeyed. Lest there might be some demur as to the conditions, ways and means, and procedure, in making the main command effective, the legislature went on

and provided for each of these and did it with a command in each instance. Why was this most unusual procedure adopted? Why were all the precedents in like cases ignored? The question of conditions, the question of routes, the question of companies, the question of terms, the question of time, the question of security, the question of interest, the question of maturity, the question of amount, each and all of them are unalterably fixed in this act as a command. Under the doctrine asserted by appellee, what then is the authority conferred? Only that the county may carry out the contract that was made for it. It could not add a word to nor eliminate one from it. This is the utmost that can be contended for the law; and if it is to be sustained it must be sustained on this construction.

But—and this but is to me written in capital letters—but this authorization comes clothed with a ringing command that the contract *shall* be made!

In his work on Constitutional Limitations, (*p. 235*), Judge Cooley says:

"But those cases which hold it competent for the legislature to give its consent to a municipal corporation engaged in works of public improvement outside its territorial limits, and becoming a stockholder in a private corporation, have certainly, as we think, gone to the very limits of constitutional power in this direction; and to hold that the legislature may go even further, and, under its power to control the taxation of the political divisions and organizations of the state, may *compel* them, against the will of their citizens, to raise money for such purposes, and invest their funds in these exterior undertakings, seems to us to be introducing new principles into our system of local self government, and to be sanctioning a centralization of power not within the contemplation of the makers of the American constitutions. We think if any such forced taxation

is resisted by the municipal organization, it will be very difficult to defend it as a proper exercise of legislative authority in a government where power is distributed on the principles which prevail here."

Cook, in his excellent treatise on Stock and Stockholders, (*Sec. 91*), says:

"In California the courts go even to the extent of holding that the legislature may compel a municipality to subscribe to the stock of a railway company, and to issue its bonds in payment thereof. But this extreme view is disapproved in New York, and in Illinois, the courts in these states *taking the better ground* that, while it is competent for the legislature to authorize a municipal subscription in a proper case, there is no power anywhere to compel such a subscription or donation."

In the case of *People, ex rel. v. D. W. & P. R. R. Co. v. Batchellor* (53 N. Y. 143) the court say, as to a mandatory statute requiring bonds to be made and delivered in a case where the consent of the taxpayers had consented to their issue, and the officers of the municipality refused to make and deliver the bonds:

"Such legislation could have been sustained by holding the power of the legislature supreme over municipal corporations for private as well as public purposes. Upon principle and authority I think it is not true as to the former, although it is as to the latter. The test is, whether the purpose to be effected is public or private; if the former a mandatory statute is valid. If the latter it is not within the province of legislation, and consequently not within the power of the legislature, and the act is therefore void. We have seen that a railroad corporation possesses some of the characteristics of both; public as to its franchises; private as to the ownership of its property, and its relations to its stockholders. Were it exclusively public the act of 1870 would be valid, but void if exclusively private. It follows

that as the legislature is supreme only as to public purposes, and as the act in question relates in part to private, that to this extent it is void; and as the latter is inseparably connected with the former, the entire act must be held void."

The case of *People v. Mayor of Chicago*, (51 Ills. 31,) was a case where the legislature enacted that commissioners should be appointed vesting in them all necessary powers, and among other things commanding the city to issue bonds for the payment of land to be condemned and to be opened as a park. The city refused to recognize the commissioners appointed and refused to make and deliver its bonds. Mandamus proceedings were brought to compel the city to make and deliver its bonds. In the opinion of the court they used these words in part, each one of which directly and pertinently apply to this question. I know not how to put the matter any clearer nor any stronger than that court has put it in the opinion cited, and therefore I quote:

"Not being a corporate authority of the city of Chicago, it cannot be said they are the authority contemplated by the fifth section of article nine of the constitution in whom the legislature may vest the power of assessing and collecting taxes for corporate purposes. Although no express power is conferred by this act upon these commissioners to assess and collect taxes, yet its equivalent, or what is worse and more oppressive, a power has been conferred upon them to impose a burden upon a small locality, and, without its consent, of half a million of dollars, to remove which resort must be had to taxation, to continue for a series of years. The relators have cited numerous authorities in support of the point they make, but they have failed to find a case wherein it has been held that the legislature can compel a city, against its will, to incur a debt by the issue of its bonds for a local improvement. While it is conceded that municipal corporations, which exist only for public

purpose, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery to carry on the affairs of state, over which, and their rights and effects, the state may exercise a general superintendance and control, we are not of opinion that power, such as it is, can be so used, as to compel any one of our many cities to issue its bonds against its will, to erect a park or for any other improvement, to force it to create a debt of millions, in effect to compel every property holder in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended, that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it, and the structures which adorn them. What would be the universal judgment, should the legislature, *sua sponte*, project magnificent and costly structures within one of our cities, triumphal arches, splendid columns, and perpetual fountains, and require, in the act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost, and impose such costs as a lien upon his property forever? What would be the public judgment of such an act, and wherein would it differ from the act under consideration?

"If the principle be admitted, that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed,—in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature. Can it be that the general assembly of the state, just and honest as its members may be, is the depository of the rights and property of the citizen? Would there be any sufficient security for property, if such a power was conceded? No well regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation.

"We fail to perceive any real difference, in principle, in forcing this burden upon the city, and imposing a like burden by the direct act of the legislature upon individual property owners within it, for in both cases the debt at maturity must be paid by such holders, while the accruing interest is a constant drain on their resources.

"No case, among the multitude that have been cited by the relators, goes to the extent of this, and with our understanding of the constitution, no warrant is found there for such legislation. Rather than attempt to compel submission to such a law, surely the alternative should be presented to the city to be deprived of its corporate franchises, for cases, if such legislation is sanctioned, may arise where a city would prefer such deprivation in preference to incurring a debt which might prove greatly detrimental to their prosperity or wholly ruinous."

This logic applies exactly to the act under consideration. If it be within legislative power to compel the county of Pima to exchange its bonds for the bonds of this paper railroad company, then it is within the legislative power to compel any member of this court to exchange your promissory note for mine, or to give my horse for yours. If the bonds sued on are to be paid, they must be paid by the property owners within the county, and these bonds are a lien upon that property. Therefore the effect of the law is to say that the property owners of the county shall mortgage their property to secure for the railway company a credit, wherewith it may prosecute its enterprise. It seems idle to discuss the proposition. Counsel for appellant, while conceding that the act is void for these reasons, at least by implication, yet insist that as the supervisors obeyed the law and issued the bonds, therefore they have done only what the law in effect authorized them to do; for a command includes an authorization. In such a case as this, under such

circumstances as these, will a court lend itself to such doctrine as this? Did the supervisors make this contract of their own free will, believing it best so to do? Or did they make this contract by force of the legislative command so to do? Was it freely and voluntarily entered into,—in a word—was it a contract? Who can answer this question?

All we know is that the supervisors of every county,—indeed, the very corner stone of our government, general and local,—is that the representatives of the people voice the wishes of the people in and by their official acts, whenever time has been given the people to see, to consider and to express their desires. In this case no such time was given. Only five days were allowed from the passage of the act before the board was ordered to meet, ordered to adopt all necessary resolutions to issue the bonds; twenty-five days longer was given in which they were ordered to deliver the bonds to the escrow. But what did the supervisors do after this act? What have they continued to do ever since? What have all the different boards that have been elected and have served Pima county since that time done? What did the board who obeyed the command do? They have refused to pay a single cent of these bonds. They are today fighting them to the utmost of their power. Is this significant? It is significant of the fact that the people, by themselves, or by their representatives, have never given their consent to this contract; and that it was the command of the legislature that printed and signed and delivered the bonds and not the consent of the people.

For these reasons I insist that the act is void *ab initio*, and that the bonds are no better than the law.

There is another view of this so-called law that is worthy of consideration.

As I have already stated, this act has but one purpose to subserve, namely—to transfer the credit of the county into the keep of the railroad company to the extent of $200,000, and this purpose comes as a command. It orders the representatives of Pima county to meet in five days; it orders the meeting to pass the necessary orders that the bonds be made and delivered to the escrow in thirty days, that is, twenty-five days after the meeting; these commands are made direct to the board of supervisors of the county. It further orders that the escrow holder shall be the treasurer of the county; it orders him to deliver these bonds to the company as soon as the county surveyor shall make a certificate stating certain things. This certificate is made the sole evidence of the facts that are to exist before the delivery. These facts constitute the first item.

The second item is the fact that the county could do neither of the things it is ordered to do by the act, nor could any or either of the other officers do any of the things they are by the act ordered to do, unless authorized so to do by legislative authority.

But, says appellant, a command is an authority. In one sense it is; but it is something more. If the lesser is to culled from the greater, the former being retained and used, and the latter disregarded, then it follows that this must be done as to each command uttered. The authorization would then stand as though the legislature had said: "You are authorized to meet, provided you meet in five days. You are also authorized to make and exchange the bonds of the county for like amounts

of bonds of the company, provided you so order at this meeting; and provided it is done to the extent of $200,000; and provided it be done on the terms and in the way named, and none other; and provided it be done with the Arizona Narrow Guage Railroad Company, and none other."

To this the board could say, under the doctrine of appellant:

"You have no right to command us, therefore we refuse to obey. The question of whether we will act or not is one that must be left to our discretion, for we are the representatives of the people who must pay these bonds, and they must agree to their issue; therefore we hold that this law, no matter what it says, and no matter how it says it, is, after all, but an authorization for us to do or not to do as we decide is best." But what does it leave you to do or not to do as you decide is best? It leaves but one solitary item. Shall the contract submitted by the legislature be ratified or not?

This was the beginning and the end of their work; and they were ordered by the legislature to ratify it.

Appellants assure us that the commands signify nothing, for the board had the undoubted right to disobey these. But, linked together as these commands are, if they disobeyed one they must disobey all. The implied authority that is found in any one of them is made subject to and on the express condition that the authority in all of them, as well as each and every command made, shall be exercised and obeyed. The act exacts strict obedience to each and all its commands, or each and all of them fail. For example: If the board decide to ratify the contract, they must issue their bonds for the full sum of $200,000; and if they deliver these bonds they must be delivered to the railroad company named in the act, and to none other; and

in exchange for the bonds of the company named, and none other; and they must be made as the act commands; and must be delivered on the terms and conditions in the act named and on none other. The county would have no right to issue two hundred and fifty thousand dollars in bonds, and it would have no right to change the contract made for them by the legislature in any any particular, no more to decrease than they could increase. This being true, on whom does the burden rest of showing that the board acted in the premises by virtue of the implied authority contained in these several commands, and not because of the commands themselves? What right has a court to say that the former controlled and not the latter? How does the one any more than the other become a presumption of law or of fact?

But, suppose appellant be right in his claim that the court will presume that the county acted by virtue of the implied authority, instead of by virtue of the express command, what follows from this? The act itself is within the caprice of the board whether it be obeyed or not. In the case of an express authorization to do or not to do a thing, the law itself is valid, is existing, is binding, whether any act or thing be done under and by virtue of the power it confers or not. But is this true in this case? The commands are invalid; but the board can exercise the implied authority that is only to be gathered from these void commands, and then only by a literal obedience to the commands and to all of them. The matter thus resolves itself into this: If the board obeys the commands, then they become good by the mere force of obedience. If this be true, and this unquestionably is true if appellant's position be true, is not the matter delegated to the board to say whether the law shall be valid or invalid? Is not this "the clear exercise of legislative power?"

Does not this vest in the board the power of deciding whether a law shall be valid or invalid?

Cooley on Limit (*p. 120*) says:

"If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the state, any more than there is to refer it to any other authority. The prevailing doctine in the courts appears to be, that, except in those cases where, by the constitution, the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration."

In the case of *Lake County v. Graham*, (*130 U. S. 681*), bonds had been issued wherein there were recitals to the effect that everything required by the law to be done had been done, and that every fact necessary by law to have existed did exist, to make the bonds lawful and binding. It was insisted that by virtue of these recitals the municipality was estopped to deny the fact that the bonds did not conform to the law. But the court said:

"All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel on the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power and would suppose such corporate bodies to be superior to the law itself."

If the board had refused to act under this statute, and if the railroad company had sought to mandamus it to compel action, the answer that the statute was a command, and that such commands were beyond legislative power, would have been upheld and sustain-

ed by the court. The law, being mandatory, would have been declared *ultra vires.* But, the board having obeyed the commands, it is therefore a good law, is to vest in the board the power to say whether the law shall be a law or not.

Against this doctrine it may be urged that this statute, when construed as a permission to do, is an existing law, and that the election it leaves with the supervisors is simply whether or no they will or will not make the contract; and that, whether the supervisors act under the authority it grants or not, yet the authority still exists.

But this answer fails to answer the vice of legisiative commands incumbering the property of the citizen; and, too, it fails to satisfy ones reason and ones sense of right The statute does not purport to be a grant of authority: it is a naked command. We only find the authority to do or not to do linked in a naked command to do. If the command is *ultra vires*, then there is no command. If we eliminate from this extraordinary statute its commands, where then will we find the necessary grant of power? Are not the two inseparably linked together? And so soon as you annihilate the one, do you not thereby destroy the other?

The law being mandatory, and the authority to ratify the contract made by the law for the county being an implied authority, and the fact that this authority cannot be exercised save but in literal obedience to the void commands, renders, in my opinion, the law void. And these things, when supplemented by the fact that no court can with any certainty say whether it was the command or the implied authorization that moved the board to act, gives to such legislation, at the least, an unwholesome flavor. For a legislalature to command a county to part with its property, and then

for the one who gets the property to say, It may have been the implied authority that lives in every command that gave me the property and not the command, is to open a new door to legislation in this country that will surely lead us into serious dangers and grave evils.

IV.

DOES THE ACT IN QUESTION CONFER AN ESPECIAL PRIVILEGE?

On March 2d, 1867, Congress enacted:

"The legislative assemblies of the several territories shall not grant private charters or especial privileges."

In his brief, (*p. 7*), my brother Barnes says:

"This act prohibits the creation of private corporations and the granting of corporate franchises and privileges by special act, and is a declaration that such franchises and privileges can be granted only by a general law."

If this definition be accepted as true, and if this is the entire scope of the prohibitions enacted, it will surely defeat these bonds; for this so-called law, under which these bonds were issued, does grant a privilege to the Arizona Narrow Guage Railroad Company, one the county could not have conferred but for this act, and one the railroad company could not have received but for this act; and the fact that it is a privilege that is extended to this company, and to none other, makes it an especial privilege, and makes the law a special law and not a general one.

But I cannot see my way to agreeing with this narrow construction, and narrow application of the general and generous

words used to convey and apply the prohibitions. These words are not ambiguous; they are terse, clear and certain. They address themselves to well known evils. These evils are, first, the granting of private charters to individuals whereby they become bodies corporate, thereby gaining many advantages over their fellows; and secondly, the legislative grant of an especial privilege to an individual or corporation. These grants are held to be contracts, to vest rights in the grantees that are unrepealable, and are therefore obnoxious to justice. And so Congress, in that these evils should not be multiplied, prohibited the territorial assemblies from granting them.

It will be noted that the words are not confined to bodies corporate, but its prohibitions apply only to things, and as to these, absolutely. These things are—1. Private charters, and 2, especial privileges. The two are not connected, for the first is followed by a disjunctive conjunction. Therefore it is clear that Congress did not look upon the two evils it prohibited as one and the same thing, and did not confine the latter prohibition to any particular person, but applied it to all persons, whether it be a county, a "municipality," a school district, or an individual. If the legislature does a thing that grants an especial privilege, no matter to whom it is granted, no matter the terms on which it is granted, in every such case the Congressional command has been disobeyed.

This is assuredly clear and conclusive. It then becomes important to know what an *especial privilege* is.

In common parlance a privilege is some advantage or benefit conferred. An especial privilege is one that is conferred on one or more, and is not general. Any right that belongs to

all of a class is not an especial privilege, but any right that is confined to one, or to less than all of a class, is. Under our statute corporations have the right to limit their liability by their charter. This is a privilege extended by the law to corporations. But if this privilege was extended to but one corporation, or to several out of the many, then the privilege would be special. This is also the definition given in the law.

In *Brenham v. Water Co.*, (*67 Texas 552*), the court defines an especial privilege to be: "*A right peculiar to the person on whom conferred, not to be exercised by another or others.*"

In *Rippey v. Knight*, (*123 Mass. 519*) the court says that it is "*A right peculiar to an individual or body.*"

In *Bank of Augusta v. Earle*, (*13 Pet. 595*) this court defines it thus: "*Franchises are special privileges conferred by government on individuals, and which do not belong to the citizens of common right.*"

Massachusetts has a bill of rights. In it is provided:

"No man nor corporation nor association of men have any other title to obtain advantages or particular privileges, etc."

In *Hewet v. Charier*, (*16 Pick 355*) the court, having the above quoted words before it, said:

"But applying the first clause in the article according to its literal meaning, we think, that in considering its operation upon any particular enactment, it is necessary to consider whether it was the intent, or one of the leading and substantive purposes of the legislature to confer an exclusive privilege on any man or class of men."

The legal effect of the words quoted from the bill of rights is the same as is the legal effect of our organic act. Both are but prohibitions against any legislative grant of any especial privilege. The case cited last therefore supplies us with a test whereby we are enabled to determine whether the thing complained of is an especial privilege or not. And this test is: Was it the intent of the legislature, or was it the substantive purpose of the legislature to confer an especial privilege on any person? If it was, then the act is within the prohibition.

The intent or the purpose of a legislature is determined by what it has done and the effect of that doing. A legislature, like an individual, is presumed to intend the natural and probable effect of its acts. In this case it is clear what it assumed to do and why it assumed to do it. It wished to lend to the company the credit of the county. It could only do this in one way, namely: by authorizing the county, if it so pleased, to make an exchange of its bonds for the bonds of the company. At least this was the way it selected. In this way the company would come into the possession of a large amount of negotiable paper of the county, which was presumably marketable. In this way a fund would, or could, be realized wherewith to crowd on the enterprise. To carry out this plan a grant of authority from the legislature to the county was indispensable. This grant was made in the form of a command, and this command was confined to the county, as one party, and to the Narrow Guage Railroad Company, as the other party. It granted to the county the right to exchange its bonds for the bonds of the company, and it granted to the company the right to exchange its bonds for the bonds of the county. Could this exchange

have been made without the act? Certainly not. By virtue of this act could a like exchange have been made by the county with any other company? Certainly not. If it required legislative grant to make the exchange, and if this grant must be in the shape of an authorization so to do, and if this authorization is to be implied from the command so to do, then the authorization comes clothed with its condition precedent, which is that the exchange shall be made with the company named. No other company on the face of the earth had the power to go to the treasurer of the county and show him the certificate of the county surveyor, hand him fifty thousand dollars of its bonds and demand that it be given therefor a like amount of the bonds of the county. This would scarcely be contended even by my brother Barnes. If these things are true, why is not this a privilege extended to the company named? Did not this act confer on this company "a right peculiar to it?" Is it not "a right peculiar to the person on whom conferred?" Is this a right that belongs "to the citizens generally of common right?" This right being conferred on no one save this company, could it be "exercised by another or others?" Without the statute the exchange could not have been made. With the statute it is claimed that it has been done. If then it be a privilege to exchange the credit of the county for the credit of a paper railroad company, and if this privilege could not have been done but for the legislative grant of power so to do, and if this privilege was confined to Pima county as one party thereto, and to the Narrow Guage Railroad Company as the other party thereto, how shall we escape the conclusion that this is a privilege, and being confined to these two parties, that it is an especial privilege?

And how shall we escape the conclusion that this special privilege was granted by the legislature against the express command of the organic act?

To my mind there can be no doubt; for if a privilege be a "peculiar advantage or benefit," (*Worcester's Dict.*) extended to one who did not therefore possess it "of common right," and if to make it especial it was "not to be exercised by another or others," then the privilege of getting these bonds from the county is a privilege, and the fact that it was extended only to the company named makes it an especial privilege.

If there could be any doubt as to this, the doubt would lose itself in the construction Congress gave to their own words in the year 1878. Because of the prohibition cited, it was believed that territorial legislatures could not pass special acts incorporating cities or towns; for this would be to grant a private charter and an especial privilege at the same time. Accordingly Congress, to set this contention at rest, adopted an amendment to the section under consideration, which was explanatory thereof, and which was, as it was plainly intended to be, a construction thereof. By this amendment it was declared:

"That the words 'the legislative assemblies of the several Territories shall not grant private charters or special privileges,' in section 1889 of the Revised Statutes of the United States, shall not be construed as prohibiting the legislative assemblies of the several Territories of the United States from creating towns, cities or other municipal corporations and providing for the government of the same and conferring upon them the corporate powers and privileges necessary to their local administration, by either general or special acts. But nothing herein shall have the effect to create or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs."

This statute clearly says that while you, the territorial assemblies of the different territories, may enact special laws creating public corporations, you must not conclude from this that public corporations may be permitted to contract any debts save "such as shall be necessary to the administration of its internal affairs." In relieving these public corporations from being included in one of these prohibitions, you must remember that we have not relieved you of the other. What other? The one to create a debt or obligation other than for a purpose necessary in the performance of the duties or obligations that are within the necessary scope of your creation. In so far as the words "private charter" are concerned, as applied to the creation of public corporations, we withdraw them; but in so far as the words "especial privilege" are concerned, as they constitute a command against granting the right to a public corporation to aid private enterprises, they are not withdrawn, and the command still stands.

If this amendment does not mean just this, then there is no meaning in English words. Where was the command in the original law forbidding public corporations from creating debts except for the necessary expenses of its internal affairs, that is to say, of its public business? It did not exist, unless it was to be found in the command that you shall not grant especial privileges. All this is accentuated when we look at the real situation. The legislature could alone authorize a public corporation to lend its credit to any one and for any one other than for its own public business. Therefore when the legislature granted this authority to the municipality it was granting an especial privilege not only to the corporation to which the aid was to

be given, but the municipality as well. If it was granted to all corporations alike, then the privilege was general to a class; if granted to all municipalities alike, then it was a general privilege. These general privileges were not within the prohibition. And yet Congress, by its amendment, knowing well what it was doing, took pains to make the prohibition apply to general as it had theretofore applied only to especial privileges. And so it carefully said that the amendment they adopted should not be construed into authorizing "*any such* corporation to incur hereafter any debt or obligation other than such," etc.

To a mind rightly balanced the amendment was necessary so far as the questions at bar are concerned; but to those who think that the public purse must be ever open to aid weaklings who have speculative schemes for the alleged development of the country, this construction that Congress has put upon its two prohibitions resolves all doubts, and makes its meaning clear and the application of that meaning certain. It tells us, as clearly as it can be written, that this especial privilege, namely, the one of granting authority to municipalities of spending the money of the people in aid of private enterprises, must no longer be done; and that these especial privileges that are prohibited, must not be construed into a belief that the territorial assemblies have the power to invest, or give, or loan, the money of the public in aid of these enterprises.

APPELLANT'S POSITIONS.

It is urged by the appellee that this amendment does not apply to this case, because the amendment only goes, it is said, to the extent of permitting special acts for the incorporation of

"towns, cities and other municipal corporations;" that a county is not a municipal corporation, but is an "arm of the state," etc.

Suppose this be admitted, what does it signify? Suppose the act in question be a private charter, and that it was conferred on the county, and that counties are not included in the prohibition against private charters, we have not thereby reached or touched the second prohibition, the one to which we appeal, the one prohibiting the grant of an especial privilege to any one, whether that one be a county, a municipality, or an individual. The legislature has no more right to grant Pima county an especial privilege than it has to grant me one; for it is prohibited from granting an especial privilege at all.

Nevertheless I believe that the words quoted in the amendment do include Pima county, for each county in this Territory is expressly made "a body politic and corporate." (*Rev. Stat. Sec. 381.*) The reasons assigned in those cases, that hold that a county is not strictly speaking a municipal corporation, do not apply to the case of our counties, for those cases hold that a county is not a body corporate. In the case of *Sherman County v. Simmons*, (*109 U. S. 749*) the court says:

"If a corporation at all, it is necessarily a municipal corporation."

Our statute provides:

"Every county is a body politic and corporate, and as such has the power specified in this act, and such powers as are necessarily implied from those expressed."

This would seem decisive of this point, if it be a point; but the learned gentleman himself argues it out of existence. He tells us that a school district is not a municipal corporation; that

a county is not, and that only towns and cities are. And yet the words of the Congressional enactment are: "Towns, cities *or other* municipal corporations." Evidently Congress must have thought that there were other municipal corporations than towns and cities. As a matter of fact we call all political corporations municipal corporations, and if a county is made a body corporate it is a municipal corporation. Take the cases cited in this brief and counties are spoken of by the courts as municipalities.

The doctrine of estoppel is appealed to in this case, and upon the most novel ground ever presented to the consideration of a court. It is, that the railroad company does not gain its authority from this act to make the exchange commanded by the act, therefore its acts are not *ultra vires:* therefore it is bound by the contract: the act being *ultra vires* as to the county, it is not bound; therefore the company is bound, but the county is not.

I cannot quite see the force of this argument. It seems to me that if the county is not bound the company is not bound. The consideration, in such a case, would fail, would it not? If such an argument be good, all municipal aid bonds would be good, even without legislative authority to issue them, for the company would not gain its authority from any authorization extended to the county, and hence it would not signify whether the county had any or not.

The same doctrine is appealed to for another reason, namely:

"The county having voluntarily done so [issued the bonds] cannot be heard to say its act is void because of a special priv-

ilege to the company which it has selected to carry out the end desired, though it might have refused to do so."

This doctrine is, if I understand it, and I am far from sure that I do, that the county having done a prohibited thing, is estopped from setting up the prohibition. In other words, the doing of a thing prohibited, abolishes the prohibition. This doctrine bears down very hard on statutory prohibitions.

I will spare the court an analysis of the cases cited by appellant. A somewhat careful examination of them leads me to the conclusion that a review would be profitless, and we would find none of them assailing the views I have above expressed. That this somewhat sweeping assertion may be justified, I will give but one out of the many examples appellant's brief furnishes in proof of my assertion, namely:

On page 21 of appellant's brief he says:

"The case of the *K. U. Ry. v. County of Bourbon*, 3 *S. W. 688*, clearly and positively holds that a law which authorized the county to subscribe to the stock of a particular railroad company is not a grant of any exclusive privilege or immunity in the railroad company. 'It does not confer directly or indirectly a personal privilege in the meaning of the constitution.'"

From the above one would conclude that one of the gravest questions in this case had already been examined and solved by the court of appeals of Kentucky; but after examination, we find this is not the case. Indeed, the quoted words from this case, as written by appellant in his brief, I am unable to find in the case at all. In part they are there, but in part only, and as applied and as spoken they have quite a different meaning from the one given by appellant.

It appears that a railway company was chartered by the legislature of that state. In the charter it was provided that

counties, towns, etc., could subscribe to the stock of the company, if the question was first ratified by a vote of the people. In this case no claim was made that this provision of the charter was void for any reason.

As applied to the county of Bourbon the legislature enacted that:

"In all votes of subscription, and taxation therefor, for railroad purposes hereinafter to be made in the county of Bourbon, the portion of the county outside the limits of the city of Paris, as they existed under the act of March 5, 1868, shall vote separately from the portion of the county embraced within said limits: and no tax shall be imposed for said purpose upon the property of those residing outside said limits unless the votes of a majority of the voters thus residing outside said limits shall be cast in favor of such subscription and tax."

The constitution of the state provided:

"All freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to *exclusive separate public emoluments or privileges from the community*, but in consideration of public services."

And it further provides that "all elections shall be free and equal."

The county court ordered an election to be held pursuant to the statute above quoted. That is to say, that the people living within the lines of the city of Paris as they existed at the time named in the statute should vote separately from those living outside those lines, and that the ones living outside those lines should not be bound by the subscription unless they voted in favor of the subscription. The question submitted to the court was: Did this statute, and the vote taken under it, contravene the articles of the state constitution quoted? As to this the court says:

"The meaning and effect of the act is to require, not only a majority of all the votes cast in the county, which sufficed under section 19 of the act of 1854, but also a majority of those residing outside the limits mentioned, in order to authorize the subscription *and tax. And thus construed, is the act in violation of either of the provisions of the constitution quoted?*"

The court answers its question in these words:

"The statute is intended to protect and conserve the interests and rights of a district or geographical division of Bourbon county, and does not confer, directly or indirectly, a personal privilege at all, much less an exclusive privilege, in the meaning of the constitution. In our opinion the act of 1876 is not invalid for either of the reasons mentioned, or any other."

The question was not in that case whether an especial privilege had been conferred upon this railway company, but whether an exclusive privilege had been conferred by permitting localities, or districts, of the county to vote separately as to whether they should or should not subscribe to the railroad company. As to this the court first construes the statute, and then says "thus construed" is not in violation; and how did they construe it? By holding that the law required the entire county to vote, and that there must be a majority of the outside vote. In the city of Paris there was a majority for the bonds, and outside a majority against; and so the court held that the subscription was void.

It will therefore be seen that this case gives no light to the question at bar. A like examination made of the other cases cited will, I think, bring us to a like result.

In conclusion I desire to emphasize the importance of the two last questions discussed by appellee, and to plead this as my excuse for having presented them so much in detail.

VI.

Independant of the forgoing questions, I submit that this appeal must be dismissed for want of jurisdiction, or the judgment of the lower court must be affirmed for the reason that this record does not contain a prayer for the reversal of the judgment.

One of the statutory conditions of an appeal is an appeal bond. The chief object of the bond is to protect the appellee. A bond therefore that utterly fails in extending this protection is no bond. It surely must be a bond on which appellee can recover in case of breech.

The bond in this case (Transcript p. 22), is signed "Charles Edward Lewis, by Wm. H. Barnes, His Att'y," as principal, and by William H. Barnes and John H. Martin, as sureties. The authority of Wm. H. Barnes to sign appellant's name to a bond does not appear, and as to this I am not advised; but the record shows that Wm. H. Barnes and John H. Martin are attorneys of record for appellant in this cause. (Transcript p. 21.)

On March 19, 1891, the following act of the legislative assembly of the territory of Arizona was approved:

"Section 1, Paragraph 2218, Title 40, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows: If the officer finds the sureties sufficient he shall endorse his allowance on the bond and cause it to be filed with the clerk or justice, *provided, that no bond shall be allowed or approved wherein any attorney of record of either party to the suit or proceeding may be surety.*" (Sess. Laws 1891, p, 143).

The bond in this case is therefore in clear disobedience of this mandatory statute, and is of course void.

With a void appeal bond can this court acquire jurisdiction?

Another statutory condition of an appeal is that in the transcript there shall be a "prayer for reversal." This record omits this prayer. (Rev. Stat. U. S., Secs. 997 and 1012).

Will this court consider an appeal wherein this command is disobeyed?

I submit these two questions are at least serious ones.

Respectfully submitted.

CHARLES WESTON WRIGHT,

Attorney for Appellee.

RECORD, CASE NO. 15,352.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 968.

CHARLES EDWARD LEWIS, APPELLANT,

vs.

PIMA COUNTY, ARIZONA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Reply of Appellant to Brief of Appellee.

In reply to the last (IV.) point by Appellee, we have to say, first: That the appeal from the Supreme Court of Arizona to the Supreme Court of the United States, is a creature of laws of Congress. and not of the statutes of Arizona.

The act of March 19th, 1891, Ariz., cited on page 42 of Appellee's brief does not apply to this procedure. The law itself does not make such a bond void, and has no penalty. It simply enacts that the officer whose duty it be shall not allow or approve a bond where an attorney of record in the case is a surety.

But suppose such officer do allow and approve such bond; it does not follow that the bond is void, by any means.

Again, the Act is an amendment to Sec. 2218 of the Revised Statutes of Arizona, which is the 4th Section of Title XL. which applies to "any suit or proceeding in any of the courts of this territory." So that by the terms of the Act it clearly does not apply to appeals to the Supreme Court of the United States. The bond in this case was taken and approved by the Chief Justice of Arizona (Tr. page 23). It is given as required by the Revised Statutes of the United States, Sections 1000, 1909 and 1012. This bond therefore is good and sufficient and does not violate the Act cited.

II.

Counsel says there is no prayer for reversal. We insist there is. First

in the Assignment of Errors, plaintiff "alleges that there are manifest errors in the record, etc." Tr. p. 20.

It also alleges that the Judgment should have been reversed. Tr. p. 21. In the prayer for appeal to the Supreme Court he prays that his appeal be allowed and for a citation, etc., to this Court. Tr. p.22. The appeal bond recites that an appeal has been allowed to this Court "to reverse the Judgment rendered in said Court" Tr.p. 23. The citation issued as prayed for by Appellant commands the Appellee to appear in this Court "to show cause why said judgment should not be set aside, reversed, corrected and speedy justice should not be done to the party in whose behalf said appeal is allowed."

The citation is certainly the pleading of the Appellant, and here he prays for reversal. No form of words is required. Perhaps the ordinary form would be in the Assignment of Errors for Plaintiff to say "Wherefore Appellant prays that said judgment be reversed." But take it all together; the allegation in the Assignment of Errors, of manifest errors, etc., and that the judgment should have been reversed; the prayer for appeal and for citation; the recital of appeal bond that appeal is prayed for to reverse judgment; and the citation to show cause why cause should not be reversed, all together, clearly amounts to a prayer for reversal.

Assignment of Errors is not jurisdictional, and want of it is not ground for dismissal.

School District vs Hall 106 U. S. 428.

Gumbel vs Pitkin 113 U. S. 545.

If the Assignment of Errors be not jurisdictional then the prayer for reversal is not.

Benetes vs Hampton 123 U. S. 519.

The whole brief and argument of Appellant is a prayer for reversal.

Sub. 4, Rule 21 is authority for Appellant to rest assured that this Court will consider the Assignment of error as reaching to the demurrer to the complaint, found in Tr. page 3 and as amended (Tr. p. 14-15.) The amendment inserts a third line of page 32, viz. "And delivered the same then and there to said railroad company". The error is one of law, that the Supreme Court of the Territory erred, in affirming the judgment of this District Court, sustaining the demurrer to the complaint, and an appeal is prayed here to reverse that judgment of the Supreme Court of Arizona. All this is in the record and the Court has full and complete jurisdiction to consider it.

III.

Appellee contends that the complaint does not allege that the bonds were ever delivered. (Brief page 4.) He has overlooked the amendment to the complaint referred to and found on bottom of page 14 and top of page 15, Tr.

Attached to said complaint marked "Exhibit A," is a copy of one of said bonds (Tr. p. 8.) Objection was made in this Court for the first time that the Exhibit does not form part of the complaint.

Neither in the Supreme Court of Arizona, nor in the trial court was the point made, as this record shows. It would not have been made there where it is the universal practice, and where there is no distinction between law and equity pleadings, and where but one form of action exists, and where the statute requires no more than that the complaint shall contain a "full and clear statement of the cause of action without any distinction between suits at law and in equity."

R. S. Ariz. 668. This may be by including an exhibit attached as well as any other way. It is too late now to raise it as if raised in the trial court it could have been cured by amendment.

Every ground of demurrer not urged there is here waived by the plainest principles of justice and by unbroken precedent.

The bond is signed by the Chairman of the Board of Supervisors and by the Clerk of the Board with his seal. It is in the name of the County. It is signed by the County Recorder with his seal, See Tr. p. 8. The bond recites that it is one of two hundred issued in pursuance of the Act, and exchanged for a like number of bonds of the Railroad Co. This is a recital that the law had been complied with; that the railroad bonds had been delivered; that the county surveyor had made the proper certificates, and that all things required by the law for delivery of the bonds had been done, and the allegation is that they had been delivered to the Railroad company.

These recitals and allegations come fully up to the cases Appellee cites.

Bissel vs Spring Valley 110 U. S. 169.
Anthony vs County Jasper 101 U. S. 697.

The allegation is (Tr. p. 2) that the County of Pima on the day named made and issued its certain bond whereby it promised to pay the Railroad Co. or bearer $1000, with interest at 7 per cent, and delivered the same then and there to said Railroad Co. That the bond recites that it was issued under and by virtue of a certain Act and is one of a series issued in pursuance of said Act and exchanged for like bonds of the Railroad Co. "A copy of which bond is hereto attached marked Exhibit A and made part hereof."

That attached thereto was a coupon, setting it out in *haec verba*. That Plaintiff became the owner before due for value. That they have been presented and have not been paid.

Appellee is limited to the grounds of demurrer set forth in his demurrer on page 9 and 10 and cannot set up new ground here.

The allegation that the bonds were executed according to law is made by setting forth a copy of the bond and coupon in *haec verba* properly

executed. To deny the execution is a matter of defense if they purport to be legally executed. They do so purport.

The answer to Appellee on page 13 of his brief, is that there is exactly an averment that the bonds were made by the County and delivered by it under and by virtue of (or in pursuance of) this Act.

An inspection of the complaint is the answer.

In Young vs Clarendon 132 U. S., the State Treasurer was to register the bonds and finish their clerical execution by an endorsement. Nothing of the sort in the case at bar. The Treasurer was to receive Railroad bonds in exchange for County bonds. No certificate to be made by him, and no registry. Hence a purchaser for value did not look beyond the recital of the bond that the exchange had been made.

The question was as to whether the bond should have been delivered and not having been delivered whether the municipality could be sued for the debt as though delivered.

Here the allegation is that the bonds were delivered and the recitals are that the requirements of the law authorizing delivery had been complied with, hence the cases cited do not apply.

IV

As to the question raised in III of Appellee's brief, pages 13 and 29 inclusive, I refer to brief filed by Appellant and cases cited. We there discuss the cases he cites and show as we think, that the cases refusing mandamus to compel the issuing of bonds under laws directing their issue do not apply to a case where the bonds have been voluntarily issued. As to that question we think the weight of authority and the better reason to be that the Legislature has the power by law to direct a county created by law and an arm of legislative sovereignty to do whatever is within legislative power. That the County is the creature of law and the law making power may impose its terms. If the legislative will be, that a County shall construct a court house, or a jail, or a highway, for public order or for public convenience in locomotion and transportation, the legislature may direct it. A County might fail or even refuse to do what the legislature regarded as of the highest public importance. Counsel seems to misapprehend what a County is.

He discusses the question as though the legislature had directed an individual to lend his credit. He speaks of tax payers, not of the body corporate, the County. The latter may be given discretion to act or it may be required to act without discretion. The discretion in the latter case is assumed by the creating power. Be this as it may, the County having delivered the bonds the question now is, was this law authority for it to act.

The case of Lake County vs Graham 130 U. S. 681 cited, by no means conflicts with this view. It is there decided that recitals of law do not bind but that recitals of fact showing a compliance with the

law estop the County. If the recitals show that the law was not complied with, the holder of the bond, charged with knowledge of the law, cannot reap any benefit of estoppel.

The County is in that case not so estopped but the recitals actually bear notice to the bondholder that his bonds are void.

The case is also authority for the proposition that where the law has created a board authorized to determine whether the acts required by law to precede the issuing of bonds have been done the finding of that Board is conclusive and the buyer of bonds may rely implicitly upon that finding. That is the case here. Every act was done that the law required to be done in issuing these bonds. It is also recited, and the coupon in the complaint and the bond attached thereto and the allegations of the complaint all show that conclusively.

V

As to the IV subdivision (pp.29 to 41 inclusive) of Appellee's brief. We refer to discussion of especial privilege in brief heretofore filed by Appellant.

We only add that the Act of 1878, p.34, Appellee's brief, p.12 clearly was intended as a legislative construction of section 1889 R. S. U. S. and a declaration that that section was not a prohibition of especial laws creating towns, cities, etc., and the last sentence says "nothing herein shall have the effect to create or to authorize any such corporation to hereafter incur any debt or obligation other than such as shall be necessary to the administration of its internal affairs. The converse is authority to create such debt or obligation as shall be necessary to its internal affairs.

What is so necessary is a legislative not a judicial question. If the legislative will regards the constructionand maintenance of a railroad within a County necessary to the administration of its internal affairs it may so declare. A large mining camp, if you please, may be remote from the County seat. The maintenance of order may there be difficult, and quick and certain transportation for peace officers or other forces for order may be demanded for the protection of life and property. All such considerations are for the legislature and they apply to the administration of the internal affairs of the County.

This case shows that the bonds were issued and required to be issued for construction of a railway within the borders of the County.

The bonds admittedly containing apt and sufficient recitals as to authority have been issued and put upon the markets of the world, have been negotiated and have come into the hands of appellant. The demurrer admits the truth of this. There can be nothing, therefore, for the Court to consider save the question whether authority has been conferred upon the municipality to make and utter this negotiable paper. The burden of the argument of the appellee, and

its main, and indeed its only contention against the validity of these bonds is the invalidity of the law under which they are issued.

The law has been well settled, as to Territories as well as to States, that a railroad is a public use; that the power to aid railroads, or to subscribe to their stock, or to make donations towards their construction, is one which the legislative power may impose upon municipalities. The proposition that railroads are a public use and may be aided by taxation is one now so well settled as to be no longer gainsaid. It follows, therefore, that it is within the general scope and purview of legislative powers conferred upon both state and territory by the creation of a legislature, unless forbidden or restricted in the organic law. The organic law of the Territory of Arizona does not forbid, restrict or limit the exercise of this power, by the legislature, in so far as it relates to the power of the legislature to authorize the political subdivisions of the Territory to contribute such aid. It must be conceded that in this behalf the power of the legislature of the Territory of Arizona was as great as the power of a state would be, in the constitution of which there was contained the restriction of the act of March 2, 1867, to-wit: a prohibition against a grant of private charters or especial privileges. The Territory of Arizona or a state might treat the entire area as one political division and legislate with reference to it, or impose burdens upon *in solido*. Or, it might for the convenience of its own government erect quasi political sub-divisions, as counties, townships, and school districts, for convenience of administration merely. The law is too well settled that as to the creation, the continuance, the control and administration of such political sub-divisions the legislature is omipotent, and the distinction is a clear and well defined one in the law between a political subdivision of this character and a city, town, or village created by charter, general or special. In the one instance, the political subdivision is a direct emanation from the legislature, created without the consent and if need be in spite of the opposition of the people within the territorial area of such sub-division. In the other, a certain number of citizens voluntarily assemble and ask for certain charter privileges either for a definite length of time or in perpetuity, to maintain a local organization and government for their own benefit. If the legislature shall grant to such individuals a charter to be a municipal corporation, such charter is in the nature of a contract, exactly as is a charter to a private corporation, and may not be specially or directly infringed. Of course, all such municipal corporations are subject to the general laws which may be from time to time enacted by the state operative upon the people generally. But the case is different with reference to the political sub-divisions or agencies of the state for carrying out the state's policy of government.

They may at any time be abolished by the legislature, their powers restricted, and the limits and areas of such sub-divisions be cut down or enlarged. In dealing with such sub-divisions, the legislature as the supreme law-making power of the state, deals with matters appurtenant to the state as such, and not alone with reference to the individuals who may happen to inhabit such political sub-divisions.

The power of the legislature of the Territory of Arizona to pass this act, then, is referable to these two proposition: First, that the power to either directly aid or to authorize a subordinate agent of the state to aid in the construction of a railroad is a public use; and second, that the authorization of a particular county to aid or promote the construction of a particular railroad is not obnoxious to the provision of the act of congress of March 2, 1867, forbidding a grant of private charters or especial privileges.

The whole subject was recently discussed by the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in the case of Travelers Insurance Company vs. the Township of Oswego. In this case the State of Kansas had two constitutional provisions which were claimed to have been infringed by the enactment of a law which authorized the refunding of the indebtedness of a particular township and the issue of bonds therefor and which created a special commission to fund the indebtedness and to issue the bonds, and named the commissioners in the act. The constitutional provisions were as follows:

First, "All laws of a general nature shall have a uniform operation throughout the state, and in all cases where a general law can be made applicable. no special law shall be enacted."

Second, "The legislatue shall pass no special act conferring corporate powers."

If the provision of the act of congress of 1867 is applicable in the case at bar, then the law whose constitutionality was challenged in the case of the Travelers Insurance Company vs. Oswego, supra, should have been held unconstitutional and void, and conferring no authority to issue the bonds in question. The court says in that case:

"The power to levy taxes upon any property in the state to build school houses, roads, court houses, jails, and make other public improvements at the expense of the people, the power to borrow money, to pay indebtedness, to make contracts, to issue bonds on behalf of the state, all these are essentially legislative powers, and depend for their exercise upon the will of the people assembled in the legislature."

Again the court says:

"In all that that township did or could do in this regard, it was but the instrumentality or agency through which the legislature was exercising its power of administering the local goverment of the township."

A recent decision of the Supreme Court of the State of Kansas illustrates the far-reaching character of the jurisdiction of the legislature over the internal affairs of counties. It seems that certain citizens of a township advanced out of their own pockets certain funds to build a county court house. Subsequently the legislature passed an act authorizing this township to vote bonds to reimburse this citizens for this outlay. Two things are obvious from this statement: First, the township was under no legal obligation primarily to pay back this money. Second, the township received no especial benefit from the construction of the court house not fully shared by all the citizens of the county, and yet the court below held in that case that the passage of the act was an unconstitutional exercise of power. The court says in that case:

"The legislature is not confined and its appropriation of public moneys or of the sum to be raised by taxation in favor of individuals to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude and charity. Independent of express constitutional restrictions, it can make appropriations of money whenever the public well-being require is for the public good. It can, moreover, under the power to levy taxes, apportion the public burden among all the tax-paying citizens of the State, or among those of a particular section or political subdivision."

Commisioners of Linn County v. Snyder, 45 Kan. 636.

If the legislature of the Territory of Arizona, therefore, could have passed an act taxing the citizens generally of the Territory of Arizona to build this public improvement, they could equally confine the burden to the County of Pima. The question of its being a public use being answered in the affirmative, the legislature could, as the Supreme Court of the State of Kansas has said, "apportion the public burden among all the tax paying citizens of the state, or among those of a particular section, or political subdivision."

The quotations from authorities made by the learned counsel for the appellee show that his argument with relation to that clause of the act of congress forbidding the granting of especial privileges is not well founded. The language "especial privileges" to be made reasonable, must apply to individuals; it cannot apply to a political subdivision of a state or territory. If the learned counsel for appellee admit, as he must admit, that the power to make this aid was one which had been conferred by a general law upon the railroad corporation, then he must further admit of logical necessity that this act, if it grants an especial privilege grants it only to the county. But an especial privilage may, under the authorities which are uniform, be granted to the county. In many of the states in the Union, notably Pennsylvania

Oregon and California, especial chartered privileges may be granted to cities. In no state of the Union do the courts of last resort forbid the granting by the legislature of especial privileges to counties, townships and school districts, they being direct agencies of the state. The freedom of administration of the affairs of the state necessitate the right to discriminate in favor of particular political subdivisions when the occasion shall, in the judgment of the legislature, arise. The state having the free right to create its agencies in this behalf, or to abolish its agencies in this behalf, or to abolish its agencies, has correlative the right to modify, to enlarge, or to diminish the powers of such agencies.

The authorities cited with reference to the mandatory character of this law are inapplicable to this case. In the leading case from which counsel for appellee cites, the People vs. the Mayor of Chicago, the mandatory law was against a city, which comes within the exepted rule. In the states of Kansas, for example, of Indiana, of Michigan, of New York and of Illinois, the courts have uniformly upheld laws imposing special burdens or conferring special powers upon counties and townships, but have uniformly held similar laws to be constitutional when enacted with reference to the internal administration of the affairs of a city. No case will be found in the books where the exercise of such mandatory power by the legislature with reference to the imposition of taxes upon counties, townships or school districts has been held to be unconstitutional for the exellent reason that the contrary is the law.

Therefore, as has been urged in our argument in chief, the act, whether it be imperative or permissive, certainly confers authority.

That authority has been exercised, and the cases are too numerous which hold that it is within the legislative province to confer such authority especially upon a particular county. (See authorities already cited.)

Unless, therefore, there shall be found in the letter of the various acts of congress constituting the organic act of the Territory— in other words, in its fundamental law — a prohibition against the legislature passing this act, and conferring this authority, then the act is valid, and the exercise of the authority by the board of commissioners in the issue of bonds is binding upon the county in favor of the appellant in this case.

See Fletcher vs. Peck, 6 Cranch. 331.
Ulquehamer vs. the People, 13 N. Y. Reports, 391.
City of Richmond vs. Daniel, 14 Grat. 385.
Odgen vs. Saunders, 12th. Wheaton ;
Bridges vs. Shallcross 6 W. Va, 562.

All of which is respectfully submitted.

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